IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

LOUIS L. FRIEDMAN, *Appellant*

v.

THE STATE OF NEW YORK, *Appellee*

On Appeal From the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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No.

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THE STATE OF NEW YORK, *Appellee*

On Appeal From the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

Appellant is an elected Justice of the Supreme Court of the State of New York who was purportedly removed from office by a New York State Court on the Judiciary by a divided vote of four to two, without opinion or other meaningful statement of the reasons for such drastic action. He commenced an action in the Court of Claims of New York for salary, to obtain review of the constitutionality and legality of this re-

moval. He appeals from the Order and Judgment of the Court of Appeals of the State of New York entered on September 25, 1969. That Order and Judgment reinstated an Order of the Court of Claims adverse to Appellant. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that this appeal presents substantial and important questions under the Constitution of the United States.

OPINIONS BELOW

The opinion of the Court of Appeals (the "Court of Appeals") on appeal from the Appellate Division of the Supreme Court (the "Appellate Division"), is reported at 24 N.Y. 2d 528, 301 N.Y.S. 2d 484. The opinion of the Appellate Division, on appeal from the Court of Claims (the "Court of Claims") is reported at 29 App.Div. 2d 162, 286 N.Y.S. 2d 525. The opinion of the Court of Claims is reported at 53 Misc. 2d 455, 278 N.Y.S. 2d 999. The "order" of the Court on the Judiciary is reported at 12 N.Y. 2d d-e. Copies of the above are attached hereto as Appendix A, 1-4 in the order noted above.

JURISDICTION

This proceeding commenced with the filing on February 18, 1965, of a claim by Appellant in the Court of Claims for salary due him as an elected Justice of the Supreme Court of the State of New York. On motion to dismiss, and without any consideration of the merits, the Court of Claims dismissed the claim on April 14, 1967. On appeal, the Appellate Division reversed the Court of Claims and remanded to that Court for a determination of the con-

tentions set forth in Appellant's claim. The State of New York appealed that reversal to the Court of Appeals, and three questions were certified:

> "1. Was the Appellate Division correct in reversing the Order and Judgment of the Court of Claims for the reason that the Judgment of the Court on the Judiciary was not *res judicata* as to the present claim?
>
> "2. Does the Court of Claims have jurisdiction of the subject matter of the claim?
>
> "3. Does the claim state a cause of action?"

The Court of Appeals answered the first two questions in the affirmative but answered the third question in the negative, Associate Judge Burke dissenting, and therefore remanded to the Court of Claims with directions to dismiss the action. The opinion of the Court of Appeals was handed down on April 23, 1969. On September 25, 1969, the Court of Appeals denied reargument but amended its remittitur to recite:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: whether the rights of claimant under the First, Fifth, Sixth and Fourteenth Amendments were denied. The Court of Appeals held that there was no denial of claimant's constitutional rights (See 24 N.Y. 2d 528)."

Appellant appeals from the final Judgment of the Court of Appeals. Notice of Appeal to the Supreme Court of the United States was filed in the Court of Appeals on December 16, 1969. The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. Section 1257(2). Directly involved is the validity under the First, Fifth, Sixth and Fourteenth

Amendments to the United States Constitution of certain sections of the New York State Constitution, both on their face and as applied. The Court of Appeals has upheld those sections and the validity of the proceedings taken thereunder.

THE STATE CONSTITUTIONAL PROVISIONS INVOLVED

The state constitutional provisions involved are Article VI, Section 22 and its predecessor, Section 9-a, of the New York State Constitution, the pertinent texts of which are set forth in Appendix B, 1-2.

QUESTIONS PRESENTED

1. Whether the only ostensible standard of removing a Judge which is provided by the State Constitution —"for cause"—is so vague on its face or as applied that it (a) failed to give Appellant notice of the nature of conduct which might result in his removal from office or to provide a meaningful standard by which the trier of fact can determine Appellant's "guilt", thus denying Appellant due process of law and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the Constitution, and (b) "chills," by its overbreadth, conduct protected by the First Amendment to the Constitution.

2. Whether the consideration by the Court on the Judiciary of a report of a Judge presiding at a disciplinary proceeding to which Appellant was not a party —which report was never made part of the record in the proceedings before that Court, but, in the words of the Court of Appeals, "served as the complainant" against Appellant—denied Appellant the rights of confrontation and cross-examination guaranteed by the Sixth and Fourteenth Amendments to the Constitution.

3. Whether Article VI, Section 22 (formerly Section 22a) of the New York State Constitution, which, as construed by the Court of Appeals, permitted the combination in one tribunal of the functions of investigation, preferrer of charges, prosecutor, judge and jury, denied Appellant due process of law guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution.

4. Whether the addition of two charges to the charges considered against Appellant, four months after the Statement of Charges had been served, and less than 60 days before Appellant's trial (the notice period mandated by the applicable section of the New York Constitution), denied Appellant due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

5. Whether the preferral of charges against Appellant by a Court on the Judiciary which was not convened according to the requirements of the New York Constitution and thus was never legally constituted as a court, denied Appellant due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

6. Whether the dismissal by the Supreme Court of an appeal "for want of a substantial federal question" constitutes a determination on the merits to which the doctrine of *res judicata* can be applied by a state court to estop Appellant from raising Federal constitutional questions in a collateral attack on the validity of the removal proceedings, particularly where, among other things, (1) there is newly discovered evidence directly bearing on one of the questions; (2) consideration of certain of the questions was objected to on the prior appeal by the State as not properly before the Supreme

Court; and (3) decisions of the Supreme Court subsequent to the prior appeal have cast new light on the applicable constitutional principles.

STATEMENT OF THE CASE

Appellant, after 15 years' honorable public service as an Assemblyman, State Senator and member of the (Harrison) Tweed Commission on court reorganization, was appointed to the New York State Supreme Court by then Governor Harriman. Shortly thereafter he was elected to the bench (receiving in excess of one million votes) for a 14 year term which will expire on December 31, 1970. He has been stripped of his judicial office, reputation and honor for conduct wholly unrelated to his judicial work; conduct without any taint of moral turpitude or personal profit, and which he believed in good faith to be legally, morally and ethically proper. Essentially, the decision of the Court on the Judiciary ordered removal based on only two matters: (1) Appellant's role in the *Shiveck* matter, in which he considered he was acting as a good samaritan to help a neighbor prevent the theft of funds from her infant son by her estranged husband; and (2) Appellant's alleged interference with the investigation of the Arkwright Commission because, while he agreed to give the Commission full access to his financial records, he refused, upon advice of two distinguished attorneys (Messrs. Jackson A. ~~Ehrlman~~ and Theodore Kiendl), to surrender to the staff of the Commission physical possession of those records.*

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* For the Court's information, a brief summary of facts concerning the two matters referred to above and the other charges against Appellant, as shown by the record before the Court on the Judiciary, is set forth in Appendix C. The Order of the Court on the Judiciary is Appendix A-4.

The Proceedings Before the Court on the Judiciary. A New York court on the judiciary is in many respects like a court martial in that it is a noncontinuous court and is required to be formed anew whenever action by such a court is contemplated (New York State Constitution Article VI, Section 22 (formerly Section 9-a)). It does not come into being until it is organized as provided in the New York State Constitution.

On July 2, 1962, Chief Judge Desmond of the New York Court of Appeals was requested to convene a Court on the Judiciary to consider matters involving Appellant. The request to convene the Court was made in a letter to the Chief Judge written by Justice Beldock, then Presiding Justice of the Appellate Division, Second Judicial Department. The letter requested the court to consider matters involving Appellant's conduct which were disclosed in a report of Justice Meyer filed in the Appellate Division in a disciplinary proceeding involving Appellant's brother, to which Appellant was not a party. (Affidavit of Louis L. Friedman, January 6, 1967, Ex. A-B, p. 1.). The report, consisting of over 500 pages of summary, observations and conclusions concerning the testimony taken in the disciplinary proceeding, was never made part of the record in the proceeding before the Court on the Judiciary, but was treated by that court as the complaint, and therefore necessarily considered by that court.*

The New York Constitution requires that a court on the judiciary be composed of six specified judges, the Chief Judge of the Court of Appeals, the Senior Associate Judge of the Court of Appeals, and one Justice

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* "The Court of Appeals' opinion noted: 'it was the report of the Supreme Court Justice [Justice Meyer] which served as the complaint against Appellant.'" Appendix A-1, page A-16.

from each of four Appellate Divisions. (Art. VI, Section 22-b, formerly Section 7 [as]). That Constitution specifically provides that in the absence of the required complement of judges from the Court of Appeals, that Court shall designate another judge or judges from among its members to act in the place of the missing judge(s). *Id.* At the first session of the court on August 15, 1962, when the decision to prefer charges against Appellant was made and the form of the charges approved, only four judges were present, including only one Judge from the Court of Appeals. No alternate member was appointed. (Affidavit of Louis L. Friedman, January 6, 1967, Ex. A-B, page 2.) Instead, the absence of two judges was ignored, and the four who attended constituted themselves illegally as a Court on the Judiciary and proceeded to hold an *ex parte* court session.*

The Court as thus constituted bootstrapped itself into existence by adopting a rule which provided that four members of the Court on the Judiciary would constitute a quorum. Having gone through the preliminary motions of organizing a court, designating a clerk and dealing with several other preliminary matters, the Court then appointed two attorneys to prefer the charges and act as prosecuting counsel. The content and form of a Statement of Charges against Appellant, previously prepared by or at the direction of the Court on the Judiciary, based as now appears on information included in Justice Meyer's report, was formally

* The Appellant did not know until after the Court on the Judiciary had ordered his removal that only four judges attended the session because the three Orders entered by the Court that day and a press statement released by the court all stated, incorrectly, that all six judges were present. (Affidavit of Louis L. Friedman, January 6, 1967, Ex. D, E, F and G.)

approved and the appointed prosecuting attorneys were directed to serve this Statement of Charges upon Appellant and certain State officers who were entitled to notice of the charges under the Constitution of the State of New York. (Affidavit of Louis Friedman, January 6, 1967, Ex. A-13, D. E. F.) As is true of grand jury proceedings generally, the function which the Court on the Judiciary was essentially performing at the time Appellant was not invited to be present.

The Charges. The charges against Appellant, as served on him on August 16, 1962, read as follows:

"STATEMENT OF THE CHARGES ALLEGED"

"That Louis L. Friedman has abused his public office as a Justice of the Supreme Court of the State of New York, Second Judicial District, (1) by interfering with and obstructing a Judicial Inquiry and Investigation ordered by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, on the 21st day of January 1957; (2) by engaging in unethical and improper conduct in that, while a Justice of the Supreme Court, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly preserving or accounting therefor and, moreover, would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor; (3) by violating and failing to observe the concept, spirit and letter of the canons of judicial ethics, and by causing M. Malcolm Friedman to violate and to fail to observe the canons of professional ethics."

The trial, originally scheduled for October 19, 1962, was adjourned to give counsel an opportunity to agree

on a stipulated record. Prosecuting counsel insisted on incorporating evidence into that record about two matters, the *Shepard* and income tax matters (described in Appendix C) which had never been charged and as to which neither Appellant nor the various State Officers entitled to receive notice of the charges had ever been given any notice.* Objection being made to the consideration of evidence relating to those matters, the Court met on December 10, 1962, considered the objection, overruled it, and declared that evidence would be received on the two additional matters even though there was no charge before the court to which the evidence referred. In short, two additional allegations of impropriety were *heard*, although no charges relating thereto had ever *been made*.

Following the presentation to the Court on the Judiciary of testimony, briefs and oral argument, the court decided, on the same day that it heard oral argument, and by a divided vote of four to two, that Appellant should be removed from his elected judicial office.

The Prior Proceedings. The claim filed in the Court of Claims is the culmination of extensive efforts by Appellant to obtain review of the decision ordering his removal. None of the prior attempts has been determined on the merits. Because of the lack of any established right or procedure for appealing a decision of a court on the judiciary, and the fact that this was the first decision of such a court in which removal was ordered, Appellant was uncertain as to the procedure to follow in seeking review. He first sought rehearing

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* Prior drafts of charges, first found among the Clerk's records in 1967, specifically included those two matters, but those matters were not included in the final version of the charges served.

by the Court on the Judiciary, which was denied. His other efforts to obtain review are set forth in the majority opinion of the Court of Appeals. While attempting to obtain review of the removal order in the state courts, Appellant also appealed to this Court, which, at that stage of the proceedings, dismissed the appeal for want of a substantial federal question, Justice Black voting to note probable jurisdiction. *Friedman v. Court on the Judiciary*, 375 U.S. 10 (1963). Appellant's Jurisdictional Statement candidly acknowledged that he could not certify that the decision being appealed was from the highest court of the State with jurisdiction because simultaneously other proceedings were pending before the New York courts. The Jurisdictional Statement stated that the appeal to this Court was taken "as a protective measure to insure that the time allowed for appeal will not expire . . ." (Jurisdictional Statement in *Friedman v. Court on the Judiciary*, October Term, 1963 No. 285, at pages 29-30.)

The Decision Below. The Court of Appeals rejected Appellant's contention that his removal was invalid under both State and Federal law. With respect to Appellant's contentions that the Court on the Judiciary had been illegally organized and that he had not been given proper notice of the charges, the majority, per Judge Scileppi, stated:

> "Suffice it to say that we have carefully considered each of the alleged irregularities and find no merit to claimant's contention. The procedural defects, if any, relied upon by claimant do not reach jurisdictional dimensions and in no way deprived him of a fair trial." (App. A-1, p. A. 8).

The Court of Appeals rejected Appellant's contentions of deprivation of Federal constitutional rights by hold-

ing that these claims were barred by *res judicata* because of the dismissal, on motion, of Appellant's prior appeal to this Court. The court stated that, although the denial of a petition for writ of certiorari is not a determination on the merits:

> "[T]his is not true, however, where the Supreme Court dismisses an appeal from a state court 'for want of a substantial federal question'."
>
> * * *
>
> "It thus appears that having had a final determination on the merits of the issues raised in this action, claimant is estopped from again litigating them." (App. A-1, p. A. 9-10)

The Court of Appeals did not rest solely on this estoppel argument. It held, alternatively, that the removal provision of the New York Constitution was not unconstitutionally vague and that the combination of functions of accuser, prosecutor and judge "may, consonant with Due Process, exist in the Court on the Judiciary, and did not deprive Appellant of a fair trial." (App. A-1, p. A. 17) The majority opinion failed to discuss the other Federal constitutional questions presented, although the amended remittitur acknowledged that these questions were "necessarily passed upon."

In concluding that the "for cause" ground of removal is unconstitutionally vague, Judge Burke stated in dissent:

> "It is far too late to assert that the 'traditional' nature of removal proceedings can insulate them from the mandates of the Constitution (See, e.g., *In re Ruffalo*, 390 U.S. 544; *Spevack* v. *Klein*, 385 U.S. 511). One of these constitutional mandates is that no man, not even a judge, can be deprived of his liberty or property without due process of

law. And due process requires, in turn, that 'penal' provisions, in the broadest sense (*In re Ruffalo*, 390 U.S. 544; *Peters* v. *Hobby*, 349 U.S. 331; *Powell* v. *Zuckert*, 366 F. 2d 634, 640), be so drawn as to give fair warning as to the conduct sought to be proscribed and as to which a penalty may be imposed.

* * * *

"The professional standard for an elected Justice of the Supreme Court is anything but clear and the discretion left to the Court on the Judiciary by the removal provision is precisely that of defining 'for cause' on an *ad hoc* basis and after the fact of the conduct sought to be penalized; its discretion is indisputably *not* that of merely 'matching the measure of discipline to the specific case.'". (App. A-1, p. A. 17, 19)

Judge Burke also concluded that the combination of the functions of "grand jury, prosecutor, judge and jury" in the Court on the Judiciary deprived Appellant of due process:

"A fair trial in a fair tribunal is, of course, fundamental to due process. In this regard, it is important to recognize that, in considering the concept of a 'fair trial', 'our system of law has always endeavored to prevent even the probability of unfairness' and has not limited itself to preventing 'actual bias in the trial of cases.' (*In re Murchison*, 349 U.S. 133, 136; *Offut* v. *United States*, 348 U.S. 11, 14.) The majority apparently rejects claimant's contentions on this point because the record does not reveal any clear evidence of actual bias. That, however, is not conclusive of the issue since the claimant has shown that the structure and procedure of the Court on the Judiciary inherently involves the probability of unfairness since it necessarily thrusts upon the members of the Court the functions of grand jury and prosecutor in addition to its main function as trier of the

facts. This is so despite the integrity and fairness of the members of the Court (*In re Schlesinger* 172 A2d 835 [Pa.1961]; *Mack* v. *Florida*, 37 USLW 2571 [USDC Fla.]" (App. A-1, p. A. 22)

* * *

Questions 1, 3, 4 and 5 were first raised in this proceeding in an Affidavit submitted in opposition to the State's Motion to Dismiss Appellant's Claim in the Court of Claims. (Affidavit of Louis L. Friedman, January 6, 1967). Question 2 was raised on Appellant's Motion for Reargument in the Court of Appeals in view of that Court's statement that the Meyer report served as the Complaint against Appellant. Question 6, relating to the *res judicata* point, was, of course, not raised by Appellant below, but was raised by the State at all stages of the proceeding. All of the issues have been reasserted in brief and argument at every stage of this proceeding following the stage at which the issue was first raised, and as the amended remittitur of the Court of Appeals acknowledges, all of the constitutional issues were "necessarily" passed upon by that Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND IMPORTANT

I. THE REMOVAL SECTION IS UNCONSTITUTIONALLY VAGUE.

A. *The State Constitution Fails to Provide Notice of What Conduct Can or Will be Deemed "Cause" for Removal.* The section of the New York State Constitution, Article VI, Section 22 (formerly Section 9-a), under which the Court on the Judiciary removed Appellant, provides as the *only* ground for the removal of a Judge, removal "for cause". The New York Court

of Appeals has recently and correctly noted in another case involving removal of a judge:

> "Neither the Constitution nor the statutes have attempted to define what that 'cause' shall be."

Sarisohn v. Appellate Div., 21 N.Y. 2d 36, 41, 286 N.Y.S. 2d 255, 258 (1967).

In the *Sarisohn* case, the Appellate Division held that the term "for cause" "includes any misconduct . . . [such] as would disclose that the Judge's retention in office is inconsistent with the fair, proper and wholesome administration of justice." *Matter of Sarisohn*, 26 App. Div. 2d 388, 390, 275 N.Y.S. 2d 355, 358 (1966). And, in *Matter of Sarisohn*, 27 App. Div. 2d 466, 469, 280 N.Y.S. 2d 237, 243 (1967), another phase of the *Sarisohn* litigation, the Court stated that cause "may be found not only in official misconduct, but in [a Judge's] *taking attitudes and positions which show unfitness for the office and unworthiness of the trust.*" (Emphasis added.)*

The opinion of the Court of Appeals in the instant case asserted that "[t]he office of a Judge is so delicate that it is difficult, if not impossible, to enumerate and define, with legal precision, the conduct for which a Judge ought to be removed," and sought to explain, not very helpfully, that "[t]he phrase 'for cause' clearly means 'legal cause'—some cause affecting or coercing

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* In still another phase of the *Sarisohn* litigation, the United States District Court for the Eastern District of New York also indicated an awareness of the vagueness of the term "for cause," stating "the words 'for cause' mean for a cause to be enumerated and specified in each particular instance . . . ." *Sarisohn v. Appellate Div.*, 265 F. Supp. 455, 458 (E.D. N.Y., 1967).

ing the ability or fitness of the incumbent to perform the duty imposed on him.'" *Friedman v. State*, 24 N.Y. 2d 528, 540, 301 N.Y.S. 2d 484, 494 (1969). In other words, "cause" is whatever, in its unreviewable discretion, the Court of the Judiciary believes renders a Judge unfit to hold office. The Court of Appeals ignored the fact that the Federal Constitution and the constitutions and statutes of the vast majority of jurisdictions have succeeded in enumerating the reasons and bases upon which judges may be removed from office without having to rely on the vagueness inherent in the 'for cause' standard enunciated, without further elaboration, in the New York State Constitution.*

The goal of maintaining an honest, independent judiciary, in which the body politic can repose the utmost confidence, is not only commendable but imperative. However, as Judge Burke correctly observed, the United States Constitution prohibits that goal from being attained in a manner which as here provides no meaningful definition or description of the type of conduct which will warrant the drastic action of removal from elected judicial office.

It is a basic element of due process that a law must be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. . . ." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . ." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402

* The only other jurisdiction to use the "for cause" standard of removal is Illinois. Ill. State Const. Art. 6, Sec. 18 (1962).

(1966).* A statute violates due process of law if it forbids or requires conduct "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964). As Mr. Justice White recently stated in the closely analagous context of a disbarment proceeding, "a relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed". *In re Ruffalo*, 390 U.S. 544, 554 (1968) (concurring opinion).

The New York Constitution completely fails to inform judges of what conduct on their part may subsequently be deemed "cause" for removal. The applicable test—whether a judge's "retention in office is inconsistent with the fair, proper and wholesome administration of justice"—is merely another, though somewhat longer, way of stating that a judge can be removed "for cause".

The very charges on the basis of which Appellant was removed demonstrate the unconstitutional vagueness of the "for cause" standard. The first and second grounds for removal were based on the fact that Appellant did not interpret a subpoena as requiring him to surrender physical possession of his records, although he freely volunteered to make the records available for extensive investigation. Appellant's interpretation of the subpoena was taken in reliance on the opinion of two distinguished members of the Bar. If

* The void for vagueness doctrine, of course, is not limited to criminal statutes. *Id.*; *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925).

these two attorneys believed that the subpoena was satisfied by offering to make his records available for inspection rather than by physical delivery of those records, it cannot reasonably be expected that Appellant should have believed otherwise. Indisputably, a reasonable man would not expect such an interpretation to be "cause" for removal from his judicial office. Similarly, the third basis for Appellant's removal—that he had on one occasion, very shortly after going on the bench, and without fee or other compensation, assisted the six-year old child of a neighbor in connection with an insurance claim which was not a pending suit in any court—must come as an equal surprise to "men of common intelligence".*

By removing Appellant from office on the basis only of such charges, the Court on the Judiciary demonstrated that the constitutional standard for removal seeks to regulate conduct "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Baggett* v. *Bullitt*, *supra*.

The corollary aspect of the void for vagueness doctrine holds that a law violates due process if by its vagueness it delegates authority to punish conduct but leaves the person who must apply the standard "free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio* v. *Pennsylvania*, *supra*, at 402-403. To satisfy

* In fact, in referring to this matter, the prosecuting attorneys acknowledged to the Court on the Judiciary that "it may well have been an act of friendship on the part of Judge Friedman, and certainly there is no evidence of any fee having been obtained for this act . . . . I think it's an incident which perhaps taken alone would not be sufficient for removal . . . ."

the requirements of due process, a law must give to the persons who apply it a "clear idea" of how that authority is to be applied. *United States* v. *Matthews*, D.C. Cir. No. 22,310 (November 10, 1969), slip opinion p. 6; *Whitehill* v. *Elkins*, 389 U.S. 54 (1967); *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926).

As the various state courts have explained in the *Sarisohn* litigation and in the instant case, the New York Constitution permits the removal of a Judge solely on the basis of what the trial tribunal believes is best for the administration of justice. This is the equivalent of giving the removal court a judicial blank check, especially since (as the Court of Appeals expressly recognized in the present case) there is no appellate review of a decision of a court on the judiciary.

The absence of standards for removal from office violates the requirements not only of the Due Process Clause, but also the requirements of the Equal Protection Clause. By leaving the removal courts without standards, the State Constitution requires them to make ad hoc determinations with the natural result that different decisions can be made on the same set of facts.

B. *The "For Cause" Standard of Removal Chills by its Overbreadth the Exercise of Rights Protected by the First Amendment to the Constitution.* The New York Courts have interpreted "cause" to include not only whatever the removal court believes is conduct "inconsistent with the fair, proper and wholesome administration of justice", but also "taking attitudes and positions which show unfitness for the office and unworthiness of the trust." And, "'cause' is an inclusive, not a narrowly limited, term. Such 'cause'

may be directly associated with the Judge's work as a Judge *but it is not limited to such matters*". *Matter of Sarisohn*, 26 App. Div. 2d 388, 275 N.Y.S. 2d 355, 358 (1966) (quoting from *Matter of Osterman*, 13 N.Y. 2d [a]-[p]). (Emphasis added). Moreover, cause may be found in conduct or attitudes and positions taken *prior* to appointment or election to the bench. *Id.* Thus, a court on the judiciary is free to order the removal of a judge if, for example, he ever spoke in favor of the legalization of marijuana or participated in a peace rally* or appeared in public in Black Muslim garb, without regard to whether he did these things before or after his election to the office. The fact that a judge can be removed from office after his election thereto for exercising rights protected by

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* In *Matter of Troy*, 277 App. Div. 116 (1950), where a judge was charged with leading a group of people picketing the arrival of the Prime Minister of Northern Ireland, the Court found that there was no cause for disciplinary action since the judge had not himself acted as a picket or led the picket line, although he was present. But the Court indicated that a more active role would have been cause for removal:

> "We recognize, of course, that a judge has the right to entertain his personal views on controversial issues, and that he is not required to surrender his rights or opinions as a citizen. The assumption of judicial office, however, casts upon the incumbent duties in respect to his personal conduct not imposed upon him as a citizen. He should refrain from participation in activities which may tend to lessen public respect for his judicial office, and avoid conduct which may give rise to a reasonable belief that he has so participated. It is our opinion that active participation by a judge in a public demonstration of the nature described in the communication would tend to lessen public respect for the judiciary and that conduct which might be interpreted as such participation should be avoided". *Id.* at 117.

the First Amendment, *e.g.*, publicly embracing an "attitude or position" which the removal tribunal finds to be an indication of unfitness for office, must necessarily inhibit both sitting judges and those who may become judges later from freely expressing their views on controversial issues. The threat exists that a public position which the voters approve may be disapproved by a court on the judiciary and result in removal from office.

This Court has frequently and emphatically held to be void vague statutes having such an effect:

> "We emphasize once again that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms. . . . [F]or standards of permissible statutory vagueness are strict in the area of free expression . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'"
>
> * * *
>
> "For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions' . . . The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform . . . what is being proscribed."

Keyishian v. *Board of Regents*, 385 U.S. 589, 603-604 (1967). See also, *Whitehill* v. *Elkins*, 389 U.S. 54 (1967); *Stromberg* v. *California*, 283 U.S. 359 (1931); *United States* v. *Matthews*, *supra*.

II. THE CONSIDERATION BY THE COURT ON THE JUDICIARY OF EVIDENCE OUTSIDE OF THE RECORD DENIED APPELLANT HIS CONSTITUTIONALLY PROTECTED RIGHTS TO KNOW AND CHALLENGE ALL OF THE EVIDENCE AGAINST HIM.

As noted in the Statement of the Case, and as noted in the opinion of the Court of Appeals from which this appeal is taken, the proceedings before the Court on the Judiciary were initiated when Justice Beldock sent a letter to Chief Judge Desmond referring in that letter to a report prepared by a judge presiding over a disciplinary proceeding to which Appellant was not a party. Justice Beldock's letter requested the convening of a court on the judiciary on the basis of information disclosed in the report referred to above and the report thereafter served as the complaint against Appellant. In other words, the Court on the Judiciary had before it a confidential report and it was on the basis of its *ex parte* examination of this report that the decision to prefer charges was made. The report has never been made part of the record, and, of course, Appellant was given no opportunity to challenge this extra-record information.

The right not to be judged on the basis of undisclosed information and the right to confront and cross-examine witnesses or challenge documentary evidence used against oneself are basic and immutable elements of Due Process in all proceedings—civil, criminal, administrative, and regulatory:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that

it is untrue . . . . We have formalized these protections in the requirements of confrontation and cross-examination." *Greene* v. *McElroy*, 360 U.S. 474, 496 (1959).

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957); *In re Ruffalo*, 390 U.S. 544 (1968). And the rights of confrontation and cross-examination are elements of due process where, as here, a man's professional life and reputation are being determined by a Government body. See *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969); *Washington* v. *Texas*, 388 U.S. 14, 18 (1967); *Wilner* v. *Committee on Character*, 373 U.S. 96 (1963); *Hannah* v. *Larche*, 363 U.S. 420 (1960); *Williams* v. *New York*, 337 U.S. 241 (1949). The undisclosed consideration by the Court on the Judiciary of Justice Meyer's report, the contents of which served as the evidence upon which the decision to prefer charges was based, was a fundamental denial of rights guaranteed Appellant by the Sixth and Fourteenth Amendments.

III. THE FUNCTIONS OF GRAND JURY, PROSECUTOR, JUDGE AND JURY WERE UNCONSTITUTIONALLY COMBINED IN THE COURT ON THE JUDICIARY.

Judge Burke summarized the proceedings before the Court on the Judiciary as follows:

"The Court on the basis of information received from the Appellate Division [Justice Meyer's report] preliminarily determined that the 'complaint' stated facts sufficient to constitute cause for the preferral of charges. The Court then di-

> rected that the charges be drawn and served on the [Appellant]. It also appointed two attorneys to prosecute the charges and in a document in the record referred to these attorneys as 'our attorneys' and to the charges[*] as 'our charges'. The Court then heard the evidence, ordered the [Appellant's] removal and, without convening as a Court, denied [Appellant's] motion to vacate the order of removal." (App. A-1, p. A. 21-22

In short, the Court judged whether its own charges had been sustained, on the basis of evidence presented by attorneys appointed by and directed to act by itself.

A basic element of due process, whether in a criminal trial, civil trial, or administrative proceeding, is that a person who conducts an investigation or who has indicated his opinion on the particular case, cannot participate in the decision. This Court emphasized in *In re Murchison*, 349 U.S. 133 (1955), the importance of the separation of the adjudicating and accusatory bodies:

> "Having been a part of that [accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. . . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." 349 U.S. at 137.

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* In the letter referred to, the Chief Judge of the Court on the Judiciary referred to the charges as "our charges" and the prosecuting attorneys as "our attorneys," the word "our" in each instance meaning the Court on the Judiciary. Also, in commenting on Appellant's claim of insufficient notice, Judge Desmond wrote that "by *our* charges *we meant* to include the income tax matter and the negligence matter." Judge Desmond's letter appears at page 63 of the printed record in the Court of Appeals, and is reproduced as Appendix D hereto.

Indicative of the same concern is *Texaco, Inc.* v. *FTC*, 336 F. 2d 754, 760 (D.C. Cir. 1964), *rev'd on other grounds*, 384 U.S. 739 (1965). There the Court of Appeals ruled that Due Process requires that a commissioner who made a speech touching on a case in the Commission be disqualified from participation in the hearing; in *Amos Treat & Co.* v. *SEC*, 306 F. 2d 260, 267 (D.C. Cir. 1962), the elevation of an investigator to the Commission voided, on Due Process grounds, Commission proceedings in which he participated at a preliminary stage against a company he had investigated, notwithstanding an express disclaimer of any personal bias or prejudice. See *id.* at 265. See also, *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50-51 (1950).

The combination of investigative and adjudicatory functions proscribed by *Murchison* and the other cases cited are present in a highly aggravated character in the procedure followed to remove Appellant. The Court on the Judiciary acted as investigator in reading the report of Justice Meyer; as prosecutor in drawing up, or causing to be drawn up, the charges made against Appellant; as grand jury in deciding that there was sufficient ground to bring the charges against Appellant; as prosecutor also by appointing attorneys and directing them to prosecute the charges; and as trial judge and jury in adjudicating the charges. Wholly apart from the appearance of bias, necessarily inherent in any such procedure (see *Offutt* v. *United States*, 348 U.S. 11, 14), another danger of this amalgamation of functions in one body is particularly evident in this case, where the Court on the Judiciary decided to prefer charges on the basis of a secret report and had that report before it when it adjudicated its charges. A clearer violation of the principle of separation of

function between investigator or accuser and trier of fact is difficult to conceive.*

In two state cases, procedures closely similar to those at issue here were held to be fundamentally unfair. In *Matter of Schlesinger*, 404 Pa. 584, 172 A. 2d 835, 840-42 (1961),

> "the functions of prosecutor, judge and jury were combined in one body, namely the Committee on Offenses; which lodged and prosecuted and, through its Subcommittee of three of its own members, adjudicated the charge of unprofessional conduct . . . In such a procedure, so contrary to traditional American judicial concepts, unfairness was, ipso facto, inherent . . ."

In *Hanna v. Board of Aldermen*, 54 R.I. 392, 173 Atl. 538 (R.I. 1934), three of six aldermen constituted a committee on the police. They preferred the charges to the aldermen, sat on the trial, and participated in the decision. "In view of the facts," the Court noted, "it is futile to contend that these committeemen could act as impartial triers." The action of removal, therefore, was held a nullity. See also, *Mack* v. *Florida Bd. of Dentistry*, 296 F. Supp. 1259 (S.D. Fla. 1969). As far back as *The Queen* v. *London County Council*, [1892] 1 Q.B. 190, 195-96, quoting *Leeson* v. *General Council of Medical Education*, 43 Ch. D. 366, 379 (1889), it was established that:

> "Of course the rule is very plain, that no man can be plaintiff or prosecutor in any action, and

* In attempting to distinguish *Murchison*, the Court of Appeals noted that in that case "the right of cross-examination—a fundamental right, the deprivation of which is error of the first magnitude" was denied to *Murchison* by the procedures followed. It ignored the fact that the same "fundamental right" was denied Appellant by the secret consideration of Justice Meyer's report.

at the same time sit in judgment to decide in that particular case, either in his own case, or *in any case where he brings forward the accusation or complaint on which the order is made.*" (Emphasis added.)

IV. APPELLANT WAS NOT GIVEN ADEQUATE OR SPECIFIC NOTICE OF ALL THE CHARGES BROUGHT AGAINST HIM.

This Court has recently had occasion to reaffirm the constitutional requirement of adequate notice in a disciplinary proceeding. In *In re Ruffalo*, 390 U.S. 544 (1968), this Court reversed an order of disbarment predicated on a charge, added to those made against Ruffalo at the commencement of the proceedings, although no adversary testimony was heard on this added charge and although Ruffalo was granted a continuance of several *months* to respond to the new charge. "The charge must be known before the proceedings commence." The fact that Ruffalo was granted several months to respond to the charges was irrelevant; "serious prejudice to petitioner may well have occurred because of the content of the original 12 specifications of misconduct. He may well have been lulled 'into a false sense of security'. . . ." (390 U.S. at 551 n. 4.)

The right of fair notice of charges is fundamentally imbedded in the concept of due process. Notice of charges must be given "at the earliest practicable time." *In re Gault*, 387 U.S. 1, 33 (1967). See also, *Washington* v. *Texas*, 388 U.S. 14, 18 (1967); *Armstrong* v. *Manzo*, 380 U.S. 545 (1965); *cf. Vitarelli* v. *Seaton*, 359 U.S. 535, 541 (1959).

Furthermore, to satisfy the requirements of due process the notice must not only be timely given; it must be specific. "No principle of procedural due process

is more clearly established than that notice of the *specific* charge, and a chance to be heard in a trial of the issues raised by *that* charge . . . are among the constitutional rights of every accused. . . ." *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948). (Emphasis added.) The notice required by Due Process "must 'set forth the alleged misconduct with particularity' "; it must be notice of the "specific charge." *In re Gault*, 387 U.S. 1, 33 (1967).

The notice given Appellant was neither timely nor specific. Three charges were served on Appellant. On December 10, 1962, four months after the Statement of Charges was served — and less than 60 days before trial — Appellant was advised for the first time that evidence on two additional matters not included in the original Statement of Charges (the *Shevack* and tax claims) would be considered as grounds for removal. Whatever notice of the charges was thus effected, it occurred less than sixty days before the trial, although Section 22(c) of the State Constitution requires at least sixty days' notice of the charges — the period of time evidently determined by the State to be necessary for reasonable notice.

In the terms of *Gault*, it was "practicable" to give Appellant the full 60 days' notice. Documents in the files of the Court on the Judiciary indicate that these additional matters were considered prior to the time when the original charges were served, but were consciously not included. The absence of these two matters from the Statement of Charges, in the words of *Ruffalo*, "may well have . . . lulled" Appellant and Appellant's counsel into making tactical decisions they would not otherwise have made.

The Notice as given, moreover, was not sufficiently specific. The third charge, as mentioned, alleged that Appellant had: "

> "abused his public office . . . by violating and failing to observe the concept, spirit and letter of the canons of judicial ethics, and by causing M. Malcolm Friedman to violate and to fail to observe the canons of professional ethics."

There then being thirty-six canons of Judicial Ethics and forty-seven Canons of Professional Ethics, the deficiency of such a charge is self-evident. The danger of such a boilerplate charge was fully realized in this case; the Court used it as a vehicle for the introduction of the two additional matters, which were in no way foreshadowed by the charges.

V. APPELLANT WAS DENIED DUE PROCESS BY BEING TRIED BY AN IMPROPERLY ORGANIZED COURT.

A court on the judiciary does not come into being unless and until it is organized in the method prescribed by the New York Constitution. One of the conditions precedent for the creation of the court is that it be composed of six judges, two of whom shall be members of the Court of Appeals. Yet at the first session of the Court on the Judiciary purportedly organized to prosecute the charges brought against Appellant, at which session the rules of procedure were adopted, the Statement of Charges was approved, and the prosecuting attorneys appointed, only four judges were present, only one of whom was a member of the Court of Appeals. The New York Court of Appeals held that this "procedural defect" did "not reach jurisdictional dimensions and in no way deprived him of a fair trial." But it is established doctrine, as ancient as the origins of the writ of habeas corpus,

that an improperly organized "court" has no jurisdiction or power to act. *Ex parte Ayers*, 123 U.S. 443, 506 (1887); *McClaughry v. Deming*, 186 U.S. 49, 63 (1902); *United States v. Houston*, 17 U.S.C.M.A. 280, 38 C.M.R. 78 (1967) (sentence rendered by court-martial of less than requisite number was void); *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685 (1960) (participation by retired judge in *en banc* court invalidates judgment); *cf. People v. Czajowski*, 20 N.Y. 2d 808, 284 N.Y.S. 2d 7 (1967) (failure of judges on three-judge panel to consult among themselves invalidates judgment). Trial by a court that does not have jurisdiction is a denial of the due process guaranteed by the Fourteenth Amendment. *Eagles v. United States ex rel. Samuels*, 329 U.S. 304 (1946); *Bowen v. Johnston*, 306 U.S. 19 (1939); *Frank v. Mangum*, 237 U.S. 309 (1915). Appellant had the constitutional right "to be tried by a legally constituted court . . . ." *Williams v. United States*, 341 U.S. 97, 101 (1951).

VI. THE DISMISSAL BY THIS COURT OF APPELLANT'S PRIOR APPEAL WAS NOT RES JUDICATA AS TO THE FEDERAL ISSUES BEFORE THE COURT OF APPEALS.

In its majority opinion, the Court of Appeals held that Appellant was "estopped from again litigating" the "federal constitutional violations" alleged because this Court's prior dismissal of Appellant's appeal constituted "a final determination on the merits" of those issues. The only authority cited by the Court for this holding was an excerpt from Stern and Gressman, *Supreme Court Practice*, at pp. 195-196 (3d Ed. 1962).

Research has failed to reveal any decision by this Court which has held that a dismissal for want of a substantial federal question should, unlike the denial

of certiorari, be given *res judicata* effect as to all issues involved in the appeal.* Notwithstanding the statement of Messrs. Stern and Gressman, other commentators have expressed the opinion that, depending on the circumstances of a particular case, such a dismissal should not be considered as constituting an adjudication on the merits of a particular issue, thereby foreclosing it from future review. A. Bickel, *The Least Dangerous Branch*, 126 (1962); Note, *Substantial Federal Question*, 68 Col. L. Rev. 785 (1968).

As a general matter and apart from the facts of this particular case, the issue of whether or not *res judicata* effect should be given to the dismissal by this Court of an appeal for want of a substantial federal question (as opposed to a summary affirmance of an appeal which is plainly without merit) is itself a substantial federal question which should be given a full review. Even though this Court has never ruled on the point, the highest court of the State of New York has now held that such a dismissal has *res judicata* effect under all circumstances. The lower courts of New York are now bound to follow this ruling which may also be cited as a precedent by the supreme courts of other states as well as the lower federal courts.

Finally, we urge that review of this question is particularly appropriate in this case in view of the following factors:

1. As noted above (page 11, *supra*) the Jurisdictional Statement filed by Appellant on the prior appeal

* In a separate memorandum opinion in *Eaton v. Price*, 360 U.S. 246, 247 (1959), Justice Brennan stated that dismissals for want of a substantial federal question "are votes on the merits of a case," but he also observed that "plenary consideration can change views strongly held, and on close, reflective analysis precedents may appear inapplicable to varying fact situations."

acknowledged that other proceedings were pending in the New York courts to obtain review of the action of the Court on the Judiciary and that Appellant could not certify that the decision being appealed was the decision of the highest court of the state with jurisdiction to pass on the question;

2. Newly discovered evidence (Judge Desmond's letter referring to the charges as "our charges" and the attorneys as "our attorneys" (see page 24, *supra*)) was not available at the time of filing the prior appeal;

3. Intervening case law between the prior appeal and this appeal have elaborated on the constitutional principles involved. In this appeal from a proceeding collaterally attacking the decision from which the prior appeal was taken, Appellant is entitled to the benefits of changes in the applicable law; and

4. In the Motion to Dismiss or Affirm filed by the State in the prior appeal, the State argued that the question of the vagueness of the removal standard was not properly before this Court, because it was not raised in the court below.* Thus, this Court may have dismissed the appeal on this procedural ground without having considered the merits of the question presented.

We respectfully submit that the effect of a dismissal by this Court of an appeal for want of a substantial federal question is an undecided issue which should be decided by the Court, and that, at least under the unusual circumstances of this case, such a dismissal should not constitute a determination on the merits so as to preclude consideration of important constitutional issues affecting Appellant's professional career.

* *Friedman* v. *Court on the Judiciary*, October Term, 1963, No. 285, at p. 52; and Brief in Opposition to said Motion at p. 18.

VII. THE QUESTIONS PRESENTED ARE NOT ONLY SUBSTANTIAL, BUT ALSO IMPORTANT.

The constitutional questions presented by this appeal are substantial and important, not only to Appellant, but to all sitting judges and, indeed, to the multitude of other public officials who may be subject to similarly unconstitutional disciplinary proceedings. It is imperative that the increasing momentum to assure the integrity of the bench and bar, and public servants in general, be governed by procedures which will safeguard the rights of the accused as well as those of the community. The judiciary, the safeguard of the constitutional rights of all others, should not permit its own rights to be abrogated or ignored.

CONCLUSION

This appeal should be heard and decided on the merits.

Respectfully submitted,

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Date: January 30, 1970.

APPENDIX "A-1"

Opinion of New York Court of Appeals

SCILEPPI, Judge.

In 1956 claimant, Louis Friedman, was elected to the office of Supreme Court Justice for a term expiring on December 31, 1970. On July 2, 1962 the Presiding Justice of the Appellate Division, Second Department, pursuant to the State Constitution (art. VI, § 9 a [now § 22]), requested the then Chief Judge of the Court of Appeals to convene the Court on the Judiciary to consider matters involving the conduct of the claimant disclosed in a report of a Justice of the Supreme Court filed in the Appellate Division, Second Department, in a disciplinary proceeding entitled Matter of M. Malcolm Friedman (see 17 A.D.2d 644) brought against claimant's brother.

On August 15, 1962 the Court on the Judiciary[1] determined preliminarily that sufficient cause existed for preferring charges and accordingly, based on the conduct disclosed in the above-mentioned report, the following charges were served on August 16, 1962: "That Louis L. Friedman has abused his public office as a Justice of the Supreme Court of the State of New York, Second Judicial District (1) by interfering with and obstructing a Judicial Inquiry and Investigation ordered by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, on the 21st day of January 1957; (2) by engaging in unethical and improper conduct in that, while a Justice of the Supreme Court, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly

[1] The Presiding Justice of the Appellate Division, at whose request the Court on the Judiciary was convened, did not sit as a member of that court in connection with claimant's removal pro-

preserving or accounting therefor and, moreover, would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor; (3) by ignoring and failing to observe the concept, spirit and letter of the canons of judicial ethics, and by causing M. Malcolm Friedman to violate and to fail to observe the canons of professional ethics."

Trial was scheduled for October 19, 1962 but was adjourned, without date, to give counsel an opportunity to agree on a stipulated record. Claimant's counsel objected to incorporating into the record evidence upon two matters relating to claimant's alleged practice of law in violation of the State Constitution and claimant's alleged violation of the State and Federal Income Tax Laws. Objection was made on the ground that the evidence related to matters which had never been charged and as to which neither claimant nor various State officers had ever been given any notice. On December 10, 1962 the Court on the Judiciary considered the objection, overruled it and declared that the evidence would be received.

The trial was held in January and February, 1963. On February 26, 1963 the court handed down its decision dated February 22, 1963, holding that the charges had been sustained and, therefore, claimant should be removed from his office as Justice of the Supreme Court.

Claimant subsequently presented to the court his petition and a proposed order to show cause to vacate the decision of the court on the grounds (1) that two of the members of the court were not present when the court was convened on August 15, 1962 and that, therefore, the Court on the Judiciary was never properly organized; (2) that proper notice of all the charges which were to be heard before the trial was not given to the Governor of the State of New York, the President of the Senate, the Temporary President of the Senate, and the Speaker of the Assembly; and (3) that the proceedings contravened the due process

provision of the Fourteenth Amendment to the United States Constitution.

In essence, claimant contended that the court had been without jurisdiction to proceed with the matter. Treating the proposed show cause order as a motion to vacate its determination, the court denied the motion, holding that it had been properly convened and had complied with the procedural requirements of the State Constitution.

Thereafter claimant made several abortive attempts to obtain an adjudication that his removal by the Court on the Judiciary was void. He filed a notice of appeal to the Appellate Division, Third Department, from the decision of the Court on the Judiciary. In addition, he sought review there by way of article 78. Both the appeal and the article 78 proceeding were dismissed on the ground that the Appellate Division lacked jurisdiction to directly or collaterally review the jurisdiction of the Court on the Judiciary (Matter of Friedman, 19 A. D. 2d 120, 241 N.Y.S.2d 793).

Claimant also appealed to the United States Supreme Court from the determination of the Court on the Judiciary claiming Federal constitutional violations. The Supreme Court dismissed (one Justice dissenting) holding that no substantial Federal question was presented (Friedman v. Court on Judiciary of New York, 375 U. S. 10, 84 S.Ct. 70, 11 L.Ed.2d 40).

An article 78 proceeding instituted against the New York City Comptroller in the Supreme Court, New York County, to compel payment of the city's share of the salary that claimant alleges is owed to him was also dismissed on the ground that "the relief sought in the petition is not available in a proceeding under article 78 of the Civil Practice Act" (Matter of Friedman of Bearne, N.Y.L.J., Nov. 4, 1963, p. 14, col. 7). On appeal the Appellate Division, First Department, affirmed (20 A.D.2d 969, 249 N.Y.S.2d 392).

The instant action was brought in the Court of Claims o recover that portion of claimant's salary payable by he State from the date of his removal to the date of the iling of the claim, February 18, 1965, alleging that laimant was never legally removed from his elected office nd was, therefore, entitled to the salary accrued and ould continue to be entitled to salary until the expiration f his term of office on December 31, 1970. The State oved to dismiss his claim on the grounds that the Court f Claims lacked jurisdiction of the subject matter of he claim and that the claim failed to state a cause of action. he Court of Claims, in granting the motion to dis- iss, did so on the ground that the claim was barred y *res judicata* since the Court on the Judiciary had ruled dversely to the claimant on the issue of its own juris- iction to remove him and that determination could not e collaterally attacked. The Appellate Division, Third epartment, reversed in an opinion by Staley, J., 29 A. d 162, 286 N.Y.S.2d 525, and held that, since claimant's ollateral attack was directed, not at factual issues reviously litigated, but at the legal conclusion of the ourt on the Judiciary as to its own jurisdiction to re- ove claimant, the determination of the jurisdictional ssue by the Court on the Judiciary was not *res judica- a* and did not preclude the claimant from attacking the alidity of that determination in his present action. Jus- ice Gibson dissented in a memorandum and voted to af- rm on the ground that it "is unthinkable . . . that laimant should be entitled to recover salary allocable o the office from which he was thus removed, and to which e cannot be restored, for services that he did not per- orm and could not have lawfully performed". The ppellate Division granted leave to appeal to this court nd certified three questions: (1) Was the Appellate Di- ision correct in reversing the order and judgment of the ourt of Claims for the reason that the judgment f the Court on the Judiciary was not *res judicata* as to he present claim? (2) Does the Court of Claims have

jurisdiction of the subject matter of the claim? (3) Does the claim state a cause of action? For the reasons which follow, it is concluded that questions one and two should be answered in the affirmative and question three in the negative. 29 A.D.2d 906, 289 N.Y.S.2d 400.

In this case, we are concerned with the "estoppel" aspect of the doctrine of *res judicata* by which "Any right, fact, or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein, and cannot again be litigated between the parties and privies whether or not the claim or demand, purpose, or subject matter of the two suits is the same". (50 C.J.S. Judgments § 592, p. 11). Simply put, under the doctrine of *res judicata* a matter once judicially decided is finally decided; therefore, a litigant will not be heard to attack collaterally a matter which was or could have been determined in the prior litigation. Orderly procedure and repose in litigation demand that available methods of direct review be used as a vehicle for the correction of alleged errors.

In holding that claimant was prevented by the doctrine of *res judicata* from collaterally attacking his removal, the Court of Claims in pertinent part said:

"Issues of jurisdiction may be, as any other matter, the subject of *res judicata*. (United States v. Eastport Steamship Corporation, 253 F.2d 795 [2d Cir., 1958].) A court has the authority to pass upon its own jurisdiction, and its determination sustaining jurisdiction against attack, while open to direct review, is *res judicata* in a collateral action. (Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 [1940].) Claimant here raised the question of jurisdiction in the proceedings before the Court on the Judiciary, and the issue was determined adversely to him.

"The doctrine of *res judicata* is not restricted to factual determinations. It is equally applicable to questions of jurisdiction over the subject matter and to issues of law. (Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 [1938].) * * *

"If the Court on the Judiciary exceeded the jurisdiction conferred upon it under article VI of the New York State Constitution, claimant's remedy was by direct review." (Friedman v. State of New York, 53 Misc.2d 455, 457-458, 278 N.Y.S.2d 999.)

In our opinion this determination was erroneous.

Inherent in the lower court's reasoning is the assumption that claimant could have directly attacked his removal by way of appeal. There is, however, no basis or authority for this view. There is no inherent right to appeal a court's determination. The right to appeal depends upon express constitutional or statutory authorization. Section 9 a (now § 22) of article VI of the State Constitution, under which claimant was removed, establishes the Court on the Judiciary and sets forth its powers and certain procedures to be followed in removal proceedings, but nowhere in that section is a right of appeal provided for and no general constitutional or statutory provision exists for an appeal from the Court on the Judiciary. Nor can it be said that the right to appeal is inherent in the concept of due process. Thus, while the Court of Claims was of the opinion that claimant *should have* appealed from the determination of the Court on the Judiciary, it failed to take cognizance of the fact that as a matter of law claimant *could not* take an appeal.

Nor do we think that the Court of Claims was correct in stating broadly that a court's determination sustaining jurisdiction against attack is *res judicata* in a collateral action. This is true only in a case where jurisdiction

depends on a *fact* that is litigated in a suit and is adjudged in favor of the party who avers jurisdiction. Where, however, as in this case, a court's determination as to subject-matter jurisdiction is a mere legal conclusion, the want of jurisdiction to render the particular judgment may always be asserted and raised directly or collaterally.

As this court long ago said in O'Donoghue v. Boies, 159 N.Y. 87, 100, 53 N.E. 707, 710: "It is obvious that, under any other rule, a court could acquire jurisdiction of the person or the subject-matter by the mere assertion of it, or by an erroneous decision upon the law that it has it in any particular case" (see, also, Restatement, Judgments, §§8, 11).

The rule applicable here was perhaps best stated by this court in Matter of Baltimore Mail S. S. Co. v. Fawcett, 269 N.Y. 379, 388, 199 N.E. 628, 632, 104 A.L.R. 1068: "A court without jurisdiction of the subject matter of an action can acquire no jurisdiction by erroneous decision that it has jurisdiction. . . . A judgment thereafter rendered by default is void . . . and a defendant may raise and reiterate the objection of want of jurisdiction at any stage."

It is, therefore, clear that claimant is not prevented by the doctrine of *res judicata* from asserting the instant claim. Under the applicable statutes, the State is liable for the payment of a portion of the salary of the office from which claimant contends he was illegally removed. It necessarily follows that the Court of Claims had jurisdiction of the subject matter of the action, since that court, in fact, is the only forum in which the State has consented to be sued. Accordingly, the first two questions certified by the Appellate Division should be answered in the affirmative.

The third question—"Does the complaint state a cause of action?"—necessarily raises the question of the legality of

claimant's removal for, if the removal was valid, the claim must be dismissed.[2]

Claimant's attack on the removal is threefold. Initially he contends that the removal was a nullity because the failure to follow prescribed constitutional procedures with respect to the organization of the Court on the Judiciary and with respect to giving claimant and specified State officers timely notice of the charges deprived the court of subject-matter jurisdiction. Suffice it to say that we have carefully considered each of the alleged irregularities and find no merit to claimant's contention. The procedural defects, if any, relied upon by claimant do not reach jurisdictional dimensions and in no way deprived him of a fair trial.

Relying on the sweeping language contained in Matter of Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942, claimant next contends that he was denied due process of law under the Fourteenth Amendment to the United States Constitution because the Court on the Judiciary acted as complainant, prosecutor and Judge. Additionally, he contends that the removal section of the State Constitution (art. VI, § 22, formerly § 9, a) which authorizes a removal "for cause", without providing any standards to define the meaning of the term, is vague and indefinite and, therefore, violates the United States Constitution.

These contentions cannot serve as a basis for claimant's action, and in our opinion are without merit.

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[2] We note that the State's reliance on Austin v. Board of Higher Educ., 5 N.Y.2d 430, 186 N.Y.S.2d 1, 158 N.E.2d 681, for the proposition that claimant cannot recover on his claim for salary unless he is first reinstated in the office for which he seeks salary, is misplaced. *Austin* is not applicable to the facts of this case. In *Austin* the removal of the officeholder was accomplished by a legally organized body with jurisdiction to enter a removal order in a proper case. Here claimant argues that the court which removed him was never legally organized and, therefore, he was never legally removed and does not have to be reinstated.

As noted earlier, the doctrine of *res judicata* does not estop claimant from collaterally attacking the subject-matter jurisdiction of the Court on the Judiciary because there was no available means of appeal to review that question and because the court's determination as to its jurisdiction was a mere legal conclusion, not based upon any litigated fact. That holding, however, is limited solely to claimant's contentions that the Court on the Judiciary did not comply with the mandates of the State Constitution. The contentions presently under discussion, however, are concerned only with Federal constitutional violations. With respect to these contentions, claimant had available and took a direct appeal from the determination of the Court on the Judiciary to the United States Supreme Court. That appeal was dismissed for "want of a substantial federal question" (375 U.S. 10, 84 S.Ct. 70).

Claimant contends that since the appeal was met with a motion to dismiss or affirm, and since the Supreme Court did not affirm, but dismissed the appeal, this was not a decision on the merits, but only a refusal to take appellate jurisdiction, and is not a bar to the present action.

The efficacy of this argument would be apparent if the instant case involved a denial of certiorari rather than a dismissal of an appeal. The Supreme Court has frequently said that "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times" (United States v. Carver, 260 U.S. 482, 490, 43 S.Ct. 181, 182, 67 L.Ed. 361, see, also, Stern and Gressman, Supreme Court Practice [3d ed.], §§ 5-7, p. 179). This is not true, however, where the Supreme Court dismisses an appeal from a State court "for want of a substantial federal question". As Messrs. Stern and Gressman state in their treatise on Supreme Court Practice (§§ 5-18, pp. 195-196):

"*When the Court feels that the decision below is correct and that no substantial question on the merits has*

raised, it will affirm an appeal from a federal court, but will dismiss an appeal from a state court 'for want of a substantial federal question.' Only history would seem to justify this distinction; it would appear more sensible to affirm appeals from both state and federal courts when the reason for the summary disposition is that the decision below is correct. But if the bar fully understands that 'dismissed for want of a substantial federal question' in a state court appeal is the equivalent of affirmance on the merits insofar as the federal questions under 28 U.S.C., § 1257(1) and (2) are concerned, and is not limited to a determination of whether there is such a federal question, the difference in nomenclature does no harm.

"The historical difference in the wording of the Court's orders in state and federal court appeals reflects a distinction made in the Rules as to the kind of motion an appellee should file. As stated in Rule 16(1)(b), the Court will receive from an appellee 'a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question.' And Rule 16(1)(c) makes appropriate the filing of 'a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.'" (emphasis added).

It thus appears that having had a final determination on the merits of the issues raised in this action, claimant is estopped from again litigating them.

Assuming, however, that the Supreme Court's dismissal is not *res judicata* as to these issues, we are of the opinion that claimant's arguments are without merit. In Matter of Sarisohn v. Appellate Division, 21 N.Y.2d 36, 48, 286 N.Y.S.2d 255, 263, 233 N.E.2d 276, 282, the identical issues were raised and we unanimously held that: "These are contentions that go to the traditional nature of removal proceedings and at this late date do not merit discussion."

The fact that the term "for cause" is not defined by the constitutional provision authorizing the removal of a Judge does not render it void for vagueness. As Judge Bartels said in Sarisohn v. Appellate Div., Second Dept., S.Ct. of St. of N.Y., D.C., 265 F.Supp. 455, 458: "The words 'for cause' mean for a cause to be enumerated and specified in each particular instance so that the defendant may be duly notified and adequately prepared to defend the charges. It does not mean that a judge may be removed for 'cause' without more and without an enumeration of the charges constituting the alleged 'cause'. It would be impossible to enumerate in any statute all the possible grounds and circumstances justifying the removal of a judicial officer. Guidelines may be found in the Canons of Ethics, applicable to both attorneys and judges, adopted by the American Bar Association and other bar associations, and also in the general moral and ethical standards expected of judicial officers by the community. 'For cause' has been defined in several cases involving the removal of judicial officers and they provide a reasonable person with a competent definition of this phrase."

Thus in Matter of Kane v. Rudich, 256 App.Div. 586, 587, 10 N.Y.S.2d 929, it was noted that the term "cause" has been defined "as including corruption, general neglect of duty, *delinquency affecting general character and fitness for office*; acts violative of law inspired by interest; oppressive and arbitrary conduct; reckless disregard of litigants' rights, and acts justifying 'the finding that his future retention of office is inconsistent with the fair and proper administration of justice.' (Matter of Droege, 129 App.Div. 876, 882, 114 N.Y.S. 375, 386, affirmed, 197 N.Y. 44, 52, 90 N.E. 340; Matter of Brooklyn Bar Association [Hirshfield], 229 App.Div. 654, 241 N.Y.S. 601; Matter of Barlow, 141 App.Div. 640, 427 N.Y.S. 542.)"

It must be remembered that the power of removal is designed to insure efficiency and fidelity in the discharge

of official duty. The office of a Judge is so delicate that it is difficult, if not impossible, to enumerate and define, with legal precision, the conduct for which a Judge ought to be removed (cf. Ex parte Secombe, 19 How. [60 U.S.] 9, 14, 15 L.Ed. 565 [dealing with disbarment of an attorney]).

Thus it is widely recognized that "the degree of incompetency or misconduct which amounts to sufficient cause for removal must of necessity, within certain established limits, rest somewhat in the sound discretion in the officer [or body] in whom the power of removal is vested" (Matter of Stapleton v. Wheeler, 252 App.Div. 267, 270, 299 N.Y.S. 466, 472; Parish v. Young, 18 Ariz. 298, 158 P. 845; 4 McQuillin, Municipal Corporations, § 12.234, and cases cited therein). Although the body which exercises the power of removal is vested with broad discretion where the term "cause" is not defined, it is manifest that the power cannot be exercised arbitrarily. The phrase "for cause" clearly means "legal cause"—some cause affecting or concerning the ability or fitness of the incumbent to perform the duty imposed upon him (People ex rel. Munday v. Board of Fire Comrs., 72 N.Y. 445, 449).

Cause and similarly broad standards have been upheld against the charge of vagueness or used in numerous statutes, to justify removal from office or denial of license privileges.

Thus in Lehmann v. State Board of Public Accountancy, 263 U.S. 394, 44 S.Ct. 128, 68 L.Ed. 354, a State Board of Public Accountancy was authorized by statute to cancel the certificates of public accountants "for any unprofessional conduct of the holder of such certificate, or for other sufficient cause" upon written notice of 20 days and a hearing thereon. Appellant was brought up on charges and sought to enjoin the board from acting, urging, *inter alia*, that the statute is in conflict with the Constitution of the United States because it purports to authorize the revocation of a certificate without defining or determining in

advance what grounds or facts or acts shall be sufficient cause for such revocation. In rejecting this contention, the Supreme Court said (p. 398, 44 S.Ct. p. 130): "Such absence permits, it is asserted, arbitrary action. We cannot yield to that assertion or assume that the board will be impelled to action by other than a sense of duty or render judgment, except upon convincing evidence introduced in a regular way with opportunity of rebuttal. We certainly cannot restrain the board upon the possibility of contrary action. Official bodies would be of no use as instruments of government, if they could be prevented from action by the supposition of wrongful action."

In Board of Educ. of City of Los Angeles v. Swan, 41 Cal.2d 546, 261 P.2d 261, the Supreme Court of California held that a statute authorizing the removal of a teacher for unprofessional conduct was not void for vagueness because it would be impossible to enumerate in any legislative enactment those things for which a teacher might prove unworthy of the calling.

The "for cause" standard contained in section 22 (formerly § 9-a) of article VI is no more vague than standards of "misconduct", "maladministration", "malfeasance" and "malversation" in office or willful and corrupt conduct in office which are traditionally found in statutes authorizing the removal of public officers (see, e.g., Public Officers Law, Consol.Laws, c. 47, §§ 32, 36). Nor is the standard any more vague than the standard of "good behavior" with respect to Federal Judges contained in section 1 of article III of the United States Constitution.

In sum we find claimant's contention to be as wanting in substance as the United States Supreme Court did when it dismissed the claimant's appeal from the determination of the Court on the Judiciary "for want of a substantial federal question".

Claimant's contention that the functions of complainant, prosecutor and Judge were combined in the Court on the

Judiciary in violation of his constitutional rights is also without merit. Primary reliance is placed on *Matter of Murchison*, (349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942, *supra*) a criminal contempt case that is clearly distinguishable from the removal proceeding in the Court on the Judiciary. The petitioners in the *Murchison* case were called before a Michigan State Judge, who served as a "one-man grand jury" under Michigan law to investigate crime. Convinced that petitioner Murchison had committed perjury and because petitioner White had refused to answer numerous questions on the ground that he was entitled to have counsel with him, the Judge charged each of them with criminal contempt. The Judge who had been the "grand jury" then tried both petitioners in open court, convicted and sentenced them for criminal contempt. In holding that it was a violation of due process for the "judge-grand jury" to try these petitioners, the Supreme Court said (pp. 136, 137, 75 S.Ct. pp. 625-626):

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 * * *

"It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations * * * Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or

acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."

This language, although broad and seemingly all encompassing, must nevertheless be viewed in the context of the entire case. Thus the Supreme Court pointed out the Judge's recollection of what occurred during his "grand jury" secret session is likely to weigh more heavily with him than any testimony given in the open contempt trial. Indeed, the court observed that this "judge whom the process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, *the accuracy of which could not be tested by adequate cross-examination.*" (349 U.S. at page 138, 75 S.Ct., at p. 626, supra; emphasis added.)

Since the "one-man grand jury" proceeding had taken place in the secret chambers of the Judge, there were no public witnesses whom petitioners could call upon to give disinterested testimony concerning what had occurred. Finally the court noted that, if the Judge became a material witness in the contempt trial over which he was presiding, "the result would be either that the defendant must be deprived of examining or cross-examining him or elsewhere would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant. In either event the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such way." (p. 139, 75 S.Ct. pp. 626-627).

The proceedings in the Court on the Judiciary are a far cry from the *Murchison* case, where the Trial Judge not only pressed the charges, acted as a witness and could fairly be likened to a party, but the right of cross-examination—a fundamental right, the deprivation of which is error of the first magnitude (Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 19 L.Ed.2d 956)—was virtually nonexistent.

There is simply no basis for holding that the procedure followed by the Court on the Judiciary deprived claimant of a fair trial in a fair and impartial tribunal. Here the Court on the Judiciary was not the accuser, for it was the report of the Supreme Court Justice which served as the complaint. Nor can it be said that the Court on the Judiciary had an interest in the outcome of the case because it reviewed the allegations in the complaint in order to ascertain, as any court would on a demurrer or motion, whether basis existed for preferral of charges. In other words, far from prejudging the facts, the Court on the Judiciary merely determined, as a matter of law, that the report contained facts sufficient to constitute ground for the preferral of charges. The final charges were preferred by counsel designated by the court, but it cannot be assumed that, because the court designated the attorneys to conduct the proceeding, the court became so intimately involved with the case as to deprive claimant of an impartial tribunal. If this were the law, the People would have cause to object in every criminal case in which a Trial Judge assigns counsel for an indigent defendant and presides at the trial.

The Court on the Judiciary is a court of record (Judiciary Law Consol. Laws, c. 30, § 2) whose jurisdiction is strictly limited to removing or retiring a Judge or Justice and disqualifying a Judge or Justice removed from again holding any public office in this State (N.Y.Const., art. VI, § 22). To this extent the Court on the Judiciary sits to supervise the conduct of the members of the judiciary of this State, and like an administrative agency which may remove an

employee for cause, where a combination of functions is traditional, so too that combination of functions may, consonant with due process, exist in the Court on the Judiciary.

Accordingly, for the reasons stated in this opinion, the order appealed from should be reversed and the order and judgment of the Court of Claims dismissing the complaint reinstated.

BURKE, Judge (dissenting).

I concur completely in answering the first two certified questions in the affirmative. I must dissent, however, from the conclusion that the third certified question should be answered in the negative.

It is far too late to assert that the "traditional" nature of removal proceedings can insulate them from the mandates of the Constitution (see, e.g., Matter of Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed. 2d 117; Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574). One of these constitutional mandates is that no man, not even a Judge, can be deprived of his liberty or property without due process of law. And due process requires, in turn, that "penal" provisions, in the broadest sense (Matter of Ruffalo, supra; Peters v. Hobby, 349 U.S. 331, 75 S.Ct. 790, 99 L.Ed. 1129; Powell v. Zuckert, 125 U.S.App.D.C. 55, 366 F.2d 634, 640), be so drawn as to give fair warning as to the conduct sought to be proscribed and as to which a penalty may be imposed. It is clear that "Vague laws in any area suffer a constitutional infirmity" (Ashton v. Kentucky, 384 U.S. 195, 200, 86 S.Ct. 1407, 1410, 16 L.Ed.2d 469) and that "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it * * *, leaves judges and juries free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." (Giaccio v. Pennsylvania, 382 U.S. 399, 402-403, 86 S.Ct. 518, 521, 15 L.Ed. 2d 447). It is also abundantly clear that a particular pro-

vision, when challenged for vagueness, is to be tested on its own terms and that it cannot be cured of its fatal vagueness by means of clear and detailed specification of the charges sought to be prosecuted under it since the vice of a vague provision lies precisely in its failure to give fair warning *before* it is sought to be invoked. "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it * * * *It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression*". (Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 93 L.Ed. 888, emphasis added.) Thus, to rely, as the majority does, on the opinion in Sarisohn v. Appellate Div., Second Dept., S.Ct. of St. of N. Y., D.C., 265 F.Supp. 455, 458 which states that "for cause" means for cause to be specified in each particular instance, is to ignore the very nature and purpose of the vagueness principle. Such a position essentially confuses the requirement of notice sufficient to enable the party charged to prepare his defense (see Matter of Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, supra) with the separate and distinct requirement that the provision under which the charges are sought to be brought be sufficiently clear and precise as to give fair warning that particular conduct may result in the bringing of charges. (See People v. Firth, 3 N.Y.2d 472, 168 N.Y.S.2d 949, 146 N.E.2d 682.) Were the position relied upon by the majority to be adopted there would be no need to formulate a concept of vagueness since, in any case, the prosecuting authority could avoid any such challenge by minutely drawn and carefully precise charges. Suffice it to say that that proposition is not the law.

The majority's reliance on Lehmann v. State Board of Public Accountancy, 263 U.S. 394, 44 S.Ct. 128, 68 L.Ed. 354, is similarly misplaced since it takes no account of the later case of Barsky v. Board of Regents, 347 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829 in which the United States Supreme

Court dealt with a vagueness challenge to section 6514 (subd. 2) of the Education Law, Consol. Laws, c. 16, under which the license of a physician can be revoked, suspended or annulled on the ground that the physician has been convicted of a crime in a court of competent jurisdiction. In upholding that provision, the court specifically stated the applicable criteria for resolution of the vagueness challenge: "As interpreted by the New York courts, the provision is extremely broad in that it includes convictions for any crime in any court of competent jurisdiction within or without New York State. This may be stringent and harsh but it is not vague. *The professional standard is clear. The discretion left to enforcing officers is not one of defining the offense. It is merely that of matching the measure of discipline to the specific case.*" (347 U.S., at p. 448, 74 S.Ct., at p. 654; emphasis added.) By its clear implication, the opinion in *Barsky* indicates that, where the discretion of the enforcing officers *is that of defining the offense*, then the provision is unconstitutionally vague. The professional standard for an elected Justice of the Supreme Court is anything but clear and the discretion left to the Court on the Judiciary by the removal provision is precisely that of defining "for cause" on an *ad hoc* basis and after the fact of the conduct sought to be penalized; its discretion is indisputably *not* that of merely "matching the measure of discipline to the specific case." The Court on the Judiciary has itself recognized that this is the case:

"Removal of any public officer, especially one elected by the voters, is an extreme penalty. Under all the circumstances, we have decided that the charges, grave as they are, do not call for removal. In so deciding, we are not holding that improper or injudicious statements by a Judge in or out of court cannot justify removal from office. *Each case must be decided on its own merits and this court will exercise its careful discretion in each instance.*" (Matter of Sobel and Leibowitz, 8 N.Y.2d [a], [j]; emphasis added.)

"'Cause' is an inclusive, not a narrowly limited term. Such 'cause' may be directly associated with a Judge's work as a Judge but is not limited to such matters * * * 'Cause' for removal of a Judge may be found not only in official misconduct but in his taking attitudes and positions which show unfitness for the office and unworthiness of the trust." (Matter of Osterman, 13 N.Y.2d [a], [p]-[q].)

Moreover, it is undisputed that "'[n]either the Constitution nor the statutes have attempted to define what that "cause" shall be.'" (Matter of Sarisohn v. Appellate Division, 21 N.Y.2d 36, 41, 286 N.Y.S.2d 255, 258, 233 N.E. 2d 276, 278, citing Matter of Droege, 197 N.Y. 44, 51, 90 N.E. 340, 343.) Reliance is placed, however, on a number of cases (opn., pp. 539-540, 301 N.Y.S.2d p. 493, N.E.2d p. 376) which have, in fact, merely compounded the vagueness of the term "cause" by attempting to describe it in terms of equally, if not even more, vague language. The result is, nevertheless, the same: the "standard" is unconstitutionally vague in its failure to provide fair warning, *in advance*, as to what conduct constitutes cause for removal.

In addition, unlike the cases relied upon by the majority which deal with other public officials, there is no provision in the Constitution or statutes of this State under which an appeal can be taken from an order of removal by the Court on the Judiciary. (Matter of Friedman, 19 A.D.2d 120, 241 N.Y.S.2d 793.) Although it is clear that there is no constitutional right to an appeal, it is precisely this lack of any review of the determinations of the Court on the Judiciary which does make it clear that the power of removal *can be* exercised arbitrarily. The vagueness of the provision under which removal can be effected is by itself sufficient to indicate that its application is a denial of due process. But, when the lack of any review of the removal order is added to the vagueness of the removal provision, the deprivation of due process is overwhelming. Further-

more, the fact that there are other, equally vague and, again, "traditional" standards for the removal of other public officers is no answer to the fact that the standard before the court in this case is unquestionably so vague as to require the conclusion that its application to the claimant to accomplish his removal from office deprived him of due process. Although I would agree that the "power of removal is designed to insure efficiency and fidelity in the discharge of official duty", it must be pointed out that "efficiency and fidelity" may not constitutionally be achieved at the price of a citizen's constitutional rights. The difficulty, if not impossibility, which purportedly exists in devising a more precise standard can have no controlling effect on the disposition of the question of the constitutionality of the present standard, for it is clear that the entire Bill of Rights and the amendments to the Constitution inevitably make it more difficult for government to operate in a good many areas. In the area of removal of public officials such as Justices of the Supreme Court, there are additional and compelling reasons why the "difficulties" presented by due process should not be allowed to shunt due process aside in favor of "efficiency": "I need not dilate upon how critically the judicial arm of our great governing trimmvirate might be weakened if Judges, of all persons, were deprived of the pattern of protection afforded by the due process, privileges and immunity clauses of the Federal Constitution, and which are so reassuring and fortifying to other citizens." (Matter of Osterman, supra, 13 N.Y.2d [a], [q] [per Botein, J.].)

In addition to his contention as to the vagueness of the removal provision, claimant contends that the Court on the Judiciary so combined the disparate functions of Grand Jury, prosecutor, Judge and jury that he was denied a fair and impartial trial as required by the due process clause. The proceedings in the Court on the Judiciary followed an investigation involving disciplinary action against claimant's brother, an attorney. The court, on the basis

of information received from the Appellate Division, preliminarily determined that the "complaint" stated facts sufficient to constitute cause for the preferral of charges. The court then directed that the charges be drawn and served on the claimant. It also appointed two attorneys to prosecute the charges and, in a document in the record, referred to these attorneys as "our attorneys" and to the charges as "our charges." * The court then heard the evidence, ordered the claimant's removal and, without convening as a court, denied claimant's motion to vacate the order of removal. A fair trial in a fair tribunal is, of course, fundamental to due process. In this regard, it is important to recognize that, in considering the concept of a "fair trial", "our system of law has always endeavored to prevent even the probability of unfairness" and has not limited itself to preventing "actual bias in the trial of cases." (Matter of Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942; Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11.) The majority apparently rejects claimant's contentions on this point because the record does not reveal any clear evidence of actual bias. That, however, is not conclusive of the issue since the claimant has shown that the structure and procedure of the Court on the Judiciary inherently involves the probability of unfairness since it necessarily thrusts upon the members of the court the functions of Grand Jury and prosecutor in addition to its main function as trier of the facts. This is so despite the integrity and fairness of the members of the court (Schlesinger Appeal, 404 Pa. 584, 172 A.2d 835 [1961]; Mack v. Florida State Bd. of Dentistry, 296 F.Supp. 1259 [U.S.D.C., Fla.]). It seems

* I would merely note in passing that the majority's parallel to a Judge assigning counsel to represent an indigent defendant is less than accurate. The parallel would be complete if that Judge, at the time he assigned counsel, also dictated what defenses or contentions counsel was to raise in behalf of the defendant.

obvious that an elected Justice of the Supreme Court should be afforded the same structural and procedural safeguards as are available to other citizens. This court would not hesitate, I am sure, to strike down as a denial of due process a provision which would allow a bar association committee which investigates charges of professional misconduct against an attorney and which would also allow that same committee to prosecute and try those charges and impose discipline, just as the Pennsylvania Supreme Court did in Schlesinger Appeal, *supra*. In the face of the protection afforded to the attorney from such a procedure, can the approval of a procedure which denies the elected Justice that same protection be justified? The majority concludes that it can be, "consonant with due process", and with that conclusion I cannot agree and, therefore, I would affirm the order of the Appellate Division and remit the matter with directions to enter judgment for the claimant.

FULD, C. J., and BERGAN, KEATING, BREITEL and JASEN, JJ., concur with SCILEPPI, J.

BURKE, J., dissents and votes to affirm in separate opinion.

Order reversed, without costs, and the case remitted to the Court of Claims for further proceedings in accordance with the opinion herein. Certified questions (1) and (2) answered in the affirmative and certified question (3) answered in the negative.

APPENDIX "A-2"

Opinion of Supreme Court—Appellate Division, Third Judicial Department

STALEY, JR., J.

This is an appeal from a judgment and order in favor of respondent, upon a decision of the Court of Claims which dismissed appellant's claim for salary allegedly due him as an elected Supreme Court Justice.

At the general election in November 1956, claimant-appellant was duly elected to the office of Justice of the Supreme Court of the State of New York, Second Judicial District, for a term of 14 years commencing January 1, 1957, and terminating December 31, 1970, and duly qualified by filing his oath of office and, on January 1, 1957, assumed said office. On February 22, 1963 an order was made by the Court on the Judiciary removing appellant from his office as Justice of the Supreme Court, proceedings having previously been held pursuant to section 9-a (now § 22) of article VI of the Constitution of the State of New York. (*Matter of Friedman*, 12 N Y 2d [a]-[e].)

Thereafter, appellant challenged the jurisdiction of the Court on the Judiciary to make an order removing him from office, asserting that the court was without jurisdiction to entertain the removal proceeding since only four members were present at the initial organization meeting held on August 15, 1962; that the written notice of the nature of the charges against him, required by the constitution, was not given to the State officials entitled thereto; and that because the court acted as prosecutor, judge and jury, appellant's right to due process under the Fourteenth Amendment of the United States Constitution was violated. The Court on the Judiciary, considered appellant's motion to set aside its determination on the merits, and by order dated April 3, 1963, denied the motion. (*Matter of Friedman*, 12 N Y 2d [e].)

On August 16, 1963 claimant filed a notice of intention to file a claim with the Clerk of the Court of Claims. On

February 18, 1965 a formal notice of claim was filed, wherein the appellant alleged that he was a duly elected and qualified Justice of the Supreme Court, and was entitled to the salary of such office; that the State of New York had failed to pay such salary for the period commencing February 23, 1963 to February 17, 1965, and sought judgment awarding him the amount of such salary and all additional sums which would become due to the date of entry of judgment, together with appropriate interest.

On August 29, 1966 the respondent moved for an order dismissing the claim on the grounds that the Court of Claims lacked jurisdiction of the subject matter, and that the claim failed to state a cause of action. The notice of motion indicated that it was being brought "upon the decision and order of the Court on the Judiciary, dated February 22, 1963 * * * and upon the claim and all papers and proceedings herein."

The Court of Claims dismissed the claim on the ground that the claim was a collateral attack upon the jurisdiction of the Court on the Judiciary and that question, having been litigated and determined adversely to the claimant before the Court on the Judiciary, the doctrine of *res judicata* applied and barred the prosecution of the claim. The Court of Claims further concluded that the doctrine of *res judicata* applied to issues of fact and to issues of law and, if the Court on the Judiciary exceeded its jurisdiction, the "claimant's remedy was by direct review". (*Friedman* v. *State of New York*, 53 Misc 2d 455.)

The jurisdiction of the courts of the State rests upon law, both statutory and constitutional. "A court without jurisdiction of the subject matter of an action, cannot acquire jurisdiction by an erroneous decision that it has jurisdiction, and the objection of want of jurisdiction may be raised at any stage." (*Matter of Baltimore Mail S. S. Co.* v. *Faucett*, 269 N. Y. 379.)

On the motion to vacate the determination removing appellant from office, the Court on the Judiciary held on the

basis of the proposed order to show cause and movant's supporting papers, without convening to hear argument, receive briefs or discussing the motion, that it was properly convened and had acted pursuant to the provisions of the Constitution which was, in effect, a determination that it had jurisdiction over the subject matter.

The Court on the Judiciary is a court of original jurisdiction but with limited power; that is, the removal of certain judges from office. It has no appellate or review powers and is authorized by the Constitution to act only in compliance with the provisions of the Constitution and acquires no jurisdiction unless and until it does so.

The Restatement of the Law of Judgments (1942) states:

> "Section 8—A judgment is void if there is failure to comply with such requirements as are necessary for the exercise of power by the court. Section 11—A judgment which is void is subject to collateral attack both in the state in which it is rendered and in other states."

The question to be determined here is whether or not the Court on the Judiciary could, as a matter of law, confer jurisdiction upon itself that was immune from further attack. Where a collateral attack is directed not at factual issues previously litigated, but rather at the legal jurisdiction of the court over the subject matter, a collateral attack on the legal conclusion of the prior court is proper. (*Vanider* v. *Casperson*, 12 N Y 2d 56.)

In the leading case of *O'Donoghue* v. *Boies* (159 N. Y. 87), the Court of Appeals upheld a collateral attack upon a prior judgment for a partition sale stating as follows:

> "The question therefore, is not what has been decided by the court in which the sale was ordered, but what it had jurisdiction and power to do. * * * The want of jurisdiction to render the particular judgment may always be asserted and raised directly or collaterally, either from an inspection of the record itself when offered in behalf of the party claiming

> under it, or upon extraneous proof, which is always admissible for that purpose. There is but one solitary exception to this rule, and that is in a case where jurisdiction depends on a fact that is litigated in a suit and is adjudged in favor of the party who avers jurisdiction. Then the question of jurisdiction is judicially decided, and the judgment record is conclusive on that question until set aside or reversed by a direct proceeding. * * * While a court may acquire jurisdiction sufficient to exempt its judgment from collateral attack by deciding a disputed question of fact erroneously, it has never been held that it can acquire jurisdiction for any purpose by an error of law."

The Court on the Judiciary, not having determined any disputed facts relative to jurisdiction, its ruling that it had jurisdiction could not preclude a subsequent collateral attack if, as a matter of law, it never had such jurisdiction. The determination of the Court on the Judiciary as to its own jurisdiction is, therefore, not *res judicata*, and does not preclude the appellant from raising the issue of the validity of the judgment asserted against him in the prosecution of his action in the Court of Claims.

The Court of Appeals, in the recent case of *Matter of Sarisohn* (——N Y 2d ——) decided December 7, 1967, involving an appeal from an order of removal of a Suffolk County District Judge stated:

> "Moreover, there is some hypothetical basis for at least a threshold review in removal proceedings of this nature even when full reviewability is not available." (citing *Matter of Droege*, 197 N. Y. 44; *Matter of Friedman*, 19 A D 2d 120, app. dism. 375 U. S. 10.)

The Court of Claims, in determining that the doctrine of *res judicata* was not restricted to factual determinations but applied equally to issues of law, relied on the case of *Stoll* v. *Gottlieb* (305 U. S. 165). In that case the Supreme Court relied upon the fact that an actual controversy had been raised and the question of the jurisdiction over the

subject matter litigated and determined adversely to the respondent.

In the other cases cited by the court below, *Chicot County Drainage Dist.* v. *Baxter State Bank* (308 U. S. 371) and *United States* v. *Eastport S. S. Corp.* (255 F 2d 795), the Federal courts were upholding the enunciated rules of Federal courts on the subject of *res judicata*, and in no way intended to alter the *res judicata* rules of the various states. The rule in the majority of states is that *res judicata* does not apply to jurisdictional questions determined solely as an issue of law. (65 Harv. L. Rev. 818.)

The respondent further contends that the dismissal of the claim in the court below was justified, asserting that before the appellant could recover on his claim for salary, he must first be reinstated in the office for which he seeks his salary, relying on *Austin* v. *Board of Higher Educ.* (5 N Y 2d 430). In the *Austin* case the removal of the office holder was accomplished by a legally organized body with jurisdiction to enter a removal order in a proper case. The appellant here argues that the court which removed him was never legally organized. The court below also stated that "there is authority for the proposition that where such an employee has been illegally removed, he may be allowed to sue for damages without first obtaining reinstatement. (*Steinson* v. *Board of Educ. of the City of N. Y.*, 165 N. Y. 431; cf. *Burke* v. *Holtzmann*, 196 N. Y. 576.)" (See, also, *Matter of Raab* v. *Board of Trustees of Vil. of Ardsley*, 20 A D 2d 228.)

The appellant is entitled to a determination of the issue of whether or not compliance with the constitutional requirements have been met to confer jurisdiction on the Court on the Judiciary.

Since we have determined herein that, on the jurisdictional question, the Court of Claims erred in its holding that the judgment of the Court on the Judiciary was *res judicata*, and not subject to collateral attack, we have not

reached the merits on which that judgment was based, and remit the case to the Court of Claims.

The judgment and order should be reversed, on the law and the facts, without costs, and the motion to dismiss should be denied.

Gibson, P. J. (dissenting).

It is clear enough that the order of removal was final and effective. (See *Matter of Friedman*, 12 N Y 2d [a]-[e], app. dsmd. 375 U. S. 10; *Matter of Friedman*, 19 A D 2d 120.) It is unthinkable, then, in any sensible order of things, that claimant should be entitled to recover salary allocable to the office from which he was thus removed, and to which he cannot be restored, for services that he did not perform and could not have lawfully performed. Accordingly, the claim was properly dismissed. The same result was reached by the Appellate Division, First Department, which sustained the dismissal of an action, predicated on the same facts, against the Comptroller of the City of New York for the portion of the salary payable by the city. (*Matter of Friedman* v. *Beame*, 20 A D 2d 971.)

In my view, the claim before us would still have to be summarily dismissed, should respondent's objection to jurisdiction fail. The only question of any substance is whether the Court on the Judiciary was properly constituted by the attendance of but four of its six members at the initial meeting. As to that, the facts are undisputed and present no triable issue. The action taken at that meeting, including the adoption of the quorum rule, was preliminary, and was ratified and confirmed when the six members of the court proceeded in accordance therewith at all times thereafter; and, indeed, when the court itself unanimously denied appellant's subsequent motion to vacate, grounded on that same supposed defect. (*Matter of Friedman*, 12 N Y 2d [e].)

I vote to affirm.

APPENDIX "A-3"

Memorandum-Decision of Court of Claims, Del Giorno, J., Dated April 14, 1967.

COURT OF CLAIMS,
STATE OF NEW YORK.

LOUIS L. FRIEDMAN, *Claimant*.

against

THE STATE OF NEW YORK.

Claim No. 44913, M-9538.

Appearances:

Davis, Polk, Wardwell, Sunderland & Kiendl, Esqs., Attorneys for Claimant, by Claimant in person.

Honorable Louis J. Lefkowitz, Attorney General, by James Brenner, Esq., Assistant Attorney General, of counsel, for the State of New York.

DEL GIORNO, J.:

The State has moved for an order dismissing the above entitled claim on the grounds that this Court lacks jurisdiction of the subject matter and the claim fails to state a cause of action.

Claimant, Louis L. Friedman, was elected to the office of Justice of the Supreme Court of the State of New York for a period of fourteen years commencing on January 1, 1957. On July 2, 1962, a request was made to convene the Court on the Judiciary to consider matters involving the conduct of claimant arising out of matters disclosed in a report of Mr. Justice Bernard S. Meyer, filed in the Appellate Division, Second Department in a proceeding

entitled "In the Matter of M. Malcolm Friedman, an Attorney, Denis M. Hurley, Petitioner; M. Malcolm Friedman, Respondent." Acting in response to this request, Chief Judge Desmond of the Court of Appeals began the necessary preparations and, on August 15, 1962, *the Court on the Judiciary was convened pursuant* to Article VI, Section 9-a (now Section 22) of the New York State Constitution.

After trial, the Court on the Judiciary entered a determination on February 22, 1963, removing claimant from his office as Justice of the Supreme Court. *Matter of Friedman*, 12 N. Y. 2d (a-e) (1963). Thereafter, claimant prepared and forwarded an affidavit and proposed order to show cause why the determination (which claimant referred to as an order) of February 22, 1963 should not be vacated on the grounds that the Court on the Judiciary was without jurisdiction to enter such a removal order. The first of the three grounds asserted in the affidavit was that the court was without jurisdiction to entertain the removal proceedings since only four members were present at the initial organizational meeting of August 15, 1962. The second ground was that the court did not properly comply with the requirement for giving written notice of the nature of the charges to the State officials entitled thereto, and was, therefore, without jurisdiction to proceed. The final ground was that the Court on the Judiciary lacked jurisdiction to conduct removal proceedings because the court acted as prosecutor, judge and jury in violation of claimant's right to due process under the Fourteenth Amendment. The Court regarded claimant's proposed order to be in the nature of a motion to set aside its determination, and considered it on the merits. By order dated April 3, 1963, the Court on the Judiciary denied the motion to vacate the order of February 22, 1963. *Matter of Friedman*, 12 N. Y. 2d (e) (1963).

Subsequent to that determination, claimant appealed the removal order to the Appellate Division, Third Depart-

ment, and, concurrently, commenced an Article 78 proceeding, requesting that court to review the determination of the Court on the Judiciary. The Third Department dismissed both the appeal and the Article 78 proceeding on the ground that the Court on the Judiciary was a court of coordinate or superior jurisdiction to the Appellate Division, and, therefore, it lacked jurisdiction to grant the relief *requested*. *Matter of Friedman*, 19 A. D. 2d 120 (3rd Dep't 1963). Thereafter, an appeal was taken to the United States Supreme Court which was dismissed for want of a substantial federal question. *Matter of Friedman*, 375 U. S. 10 (1963). Claimant initiated no further steps to obtain a direct review of the determination of the Court on the Judiciary. Irrespective of the merits or results to be achieved, this Court is of the opinion that the fatal error made by the claimant was in not appealing directly to the Court of Appeals from the ruling of the Court on the Judiciary.

On August 16, 1963, claimant filed a Notice of Intention to file a claim in this Court, followed by the filing of a formal claim on February 18, 1965. The gravamen of the claim is that there is due and owing to claimant from the State of New York, pursuant to *Judiciary Law*, Section 142, the amount of $41,769.84 as salary for the period February 23, 1963 to February 17, 1965. It is also alleged that the State's obligation is and will be a continuing one up to and including December 31, 1970, the last day of the term of office to which claimant was elected. A companion action was also commenced in the Supreme Court, New York County, against the City of New York for its share of claimant's overall salary. By stipulation of the parties, that action has been held in abeyance pending a determination of the proceedings in this Court.

Ostensibly, the present claim is an action at law for accrued salary. In actuality, however, it is a collateral attack upon the jurisdiction of the Court on the Judiciary.

The law is clear in New York that a public employee must establish his right to his position prior to maintaining an action at law for accrued salary. *Austin* v. *Board of Higher Education of the City of New York*; 5 N. Y. 2d 430 (1959). However, there is authority for the proposition that where such an employee has been illegally removed, he may be allowed to sue for damages without first obtaining reinstatement. *Stetson* v. *Board of Education of the City of New York*, 165 N. Y. 431 (1901); Cf. *Burke* v. *Holtzmann*, 196 N. Y. 576 (1909). Accordingly, the argument is made that the determination of the Court on the Judiciary in the removal proceedings against claimant was made without jurisdiction; therefore, claimant was never legally removed, remains a Justice of the Supreme Court and, as such, is entitled to maintain this claim for salary.

It is unquestioned that a court must have jurisdiction in order to render a valid determination, and a judgment or determination granted without jurisdiction may be attacked either directly or collaterally. However, issues of jurisdiction may be, as any other matter, the subject of *res judicata*. *United States* v. *Eastport Steamship Corporation*, 255 F. 2d 795 (2nd Cir. 1958). A court has the authority to pass upon its own jurisdiction, and its determination sustaining jurisdiction against attack, while open to direct review, is *res judicata* in a collateral action. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940). Claimant here raised the question of jurisdiction in the proceedings before the Court on the Judiciary, and the issue was determined adversely to him. However, even had he not litigated the question, the result, insofar as it would prohibit a collateral attack such as here attempted, would be the same, the rule being that the doctrine of *res judicata* is a bar not only to matters actually presented, but also as respects any other available matter which might have been presented in the earlier proceeding. *Chicot County Drainage District* v. *Baxter State Bank*, *supra*; Cf. *Schuylkill Fuel*

Corporation v. *Nieberg Realty Corporation*, 250 N. Y. 304 (1929).

The doctrine of *res judicata* is not restricted to factual determinations. It is equally applicable to questions of jurisdiction over the subject matter and to issues of law. *Stoll* v. *Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104 (1938).

The doctrine of *res judicata* in question of jurisdiction over the person and over the subject matter reflects a sound public policy that there should be repose in litigation. *Peri* v. *Groves*, 183 Misc. 579, 50 N. Y. S. 2d 300 (Sup. Ct. N. Y. Co. 1944). It is just as important that there should be a place to end as that there should be a place to begin litigation. If the Court on the Judiciary exceeded the jurisdiction conferred upon it under Article VI of the New York State Constitution, claimant's remedy was by direct review.

The motion to dismiss is granted. Submit order in accordance herewith.

Dated: April 14, 1967

s/ ALEXANDER DEL GIORNO
Judge of the Court of Claims

APPENDIX "A-4"

Order of Removal

STATE OF NEW YORK
COURT OF THE JUDICIARY

At a Court on the Judiciary for the State of New York held at on the twenty-second day of February A. D. 1963.

Present,

Hon. Charles S. Desmond, *Presiding.*
" Marvin R. Dye,
" Benjamin J. Rabin,
" Arthur D. Brennan,
" William H. Cogn,
" Earle C. Bastow.

In the Matter of the Proceedings pursuant to Section 9-a of Article VI of the Constitution in relation to Louis L. Friedman, Justice of the Supreme Court, Second Judicial District.

The Court on the Judiciary, having heard the proofs of the parties as stipulated and offered and the oral arguments of counsel and having examined the briefs of counsel, finds and decides as follows:

(1) That Louis L. Friedman interfered with and obstructed a Judicial Inquiry and Investigation ordered on the 21st day of January 1957 by the Appellate Division of the Supreme Court of the State of New York Second Judicial Department;

(2) That said Louis L. Friedman engaged in unethical and improper conduct in that, while a Justice

of the Supreme Court, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly preserving or accounting therefor and, moreover, would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor;

(3) That said Louis L. Friedman by his actions as to the Shevack claim violated and failed to observe the concept, spirit and letter of the canons of judicial ethics;

(4) That by the acts and omissions described in Findings Nos. 1, 2 and 3 hereinabove, said Louis L. Friedman abused his public office as a Justice of the Supreme Court of the State of New York;

(5) That said abuse of public office and said acts and omissions are sufficient cause for the removal from office of said Louis L. Friedman;

Now therefore it is ORDERED and ADJUDGED that said Louis L. Friedman be and he hereby is removed from his office as Justice of the Supreme Court of the State of New York.

All concur except Rabin and Brennan, JJ., who dissent and vote to dismiss the charges.

A copy

RAYMOND J. CANNON,
Clerk.

APPENDIX "B-1"

~~State of~~ New York, Constitution, Art. VI, § 22

[Court on the judiciary; removal or retirement of certain judges by appellate division.] § 22. a. Any judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court or judge of the family court may be removed for cause or retired for mental or physical disability preventing the proper performance ~~of his~~ judicial duties after due notice and hearing by a court on the judiciary.

b. The court on the judiciary shall be composed of the chief judge of the court of appeals, the senior associate judge of the court of appeals and one justice of the appellate division of the supreme court in each judicial department designated by concurrence of a majority of the justices of each such appellate division of the supreme court. In the absence, inability or disqualification of the chief judge of the court of appeals or of the senior associate judge of the court of appeals, the court of appeals shall designate a judge or judges from the court of appeals to act in his or their stead. The chief judge of the court of appeals shall act as the presiding officer of the court but in the absence, inability or disqualification of the chief judge, the senior associate judge of the court of appeals sitting on the court shall act as the presiding officer.

c. The affirmative concurrence of not less than four members of the court shall be necessary for removal or retirement and the court may disqualify a judge or justice removed from office from again holding any public office of this state. Proceedings to remove or the removal of a judge or justice from office shall not prevent his indictment and punishment according to law. A judge or justice retired for disability in accordance with this section shall thereafter receive such compensation as may be provided by law.

d. The chief judge of the court of appeals may convene the court on the judiciary upon his own motion and shall convene the court upon written request by the governor or by a presiding justice of the appellate division of the supreme court or by a majority of the executive committee of the New York State Bar Association thereunto duly authorized. The court in its discretion may suspend the judge or justice from the exercise of his office pending the determination of the removal or retirement proceedings before the court.

e. After the court on the judiciary has been convened and charges of removal or retirement have been preferred against a judge or justice, the presiding officer of the court on the judiciary shall, before a hearing on charges of removal for cause commences, give written notice to the governor, the temporary president of the senate and the speaker of the assembly of the name of the judge or justice against whom charges have been preferred, the nature of the charges and the date set for hearing these charges, which shall not be less than sixty days after the giving of such notice. Immediately upon receipt of such notice, the legislature shall be deemed to be in session for the purpose of this proceeding. If any member of the legislature prefers the same charges against the judge or justice concerned within thirty days after receipt of such notice and if such charges are entertained by a majority vote of the assembly, proceedings before the court on the judiciary shall be stayed pending the determination of the legislature which shall be exclusive and final. But a proceeding by the court on the judiciary for the retirement of a judge or justice for mental or physical disability preventing the proper performance of his judicial duties shall not be stayed.

f. The court on the judiciary shall have power to designate an attorney or attorneys at law to act as counsel to conduct the proceeding, to summon witnesses to appear and

testify under oath and to compel the production of books, papers, documents and records before such counsel in advance of the trial and before the court upon the trial, to grant immunity from prosecution or punishment when the court deems it necessary and proper in order to compel the giving of testimony under oath and the production of books, papers, documents and records, and to make its own rules and procedures for the investigation and trial.

g. The court on the judiciary shall have such further powers and duties as may be provided by law.

h. The judges or justices while exercising the powers of a court on the judiciary shall serve without additional compensation but the legislature shall provide moneys by appropriation to meet the expenses of the court.

i. A judge of the courts for the city of New York established pursuant to section fifteen of this article, of the district court or of a town, village or city court outside the city of New York may, in the manner provided by law, be removed for cause or retired for disability after due notice and hearing by the appellate division of the supreme court of the judicial department of his residence.

APPENDIX "B-2"

State of New York, Constitution, Art. VI, § 9-a

[Removal or retirement of judges and justices by court on the judiciary.] § 9-a. (1) A judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a surrogate, a special surrogate, a judge of the court of general sessions of the county of New York, a county judge, a special county judge or a justice of a city court of record, may be removed or retired also by a court on the judiciary. The court shall be composed of the chief judge of the court of appeals, the senior associate judge of the court of appeals and one justice of the appel-

late division in each department designated by concurrence of a majority of the justices of such appellate division. In the absence, inability or disqualification of the chief judge of the court of appeals or of the senior associate judge of that court, the court of appeals shall designate a judge or judges from the court of appeals to act in his or their stead.

(2) No judicial officer shall be removed by virtue of this section, except for cause or be retired except for mental or physical disability preventing the proper performance of his judicial duties, nor unless he shall have been served with a statement of the charges alleged for his removal or the grounds for his retirement, and shall have had an opportunity to be heard.

(3) The trial of charges for the removal of a judicial officer or of the grounds for his retirement shall be had before a court on the judiciary. The affirmative concurrence of not less than four members of the court shall be necessary for the removal or retirement of a judicial officer. The court in its discretion may suspend a judicial officer from the exercise of his office pending the determination of the proceedings before the court. The action of the court shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any public office of honor, trust or profit under this state, or to retirement for disability; but any judicial officer whose removal is sought shall be liable to indictment and punishment according to law. A judicial officer retired for disability in accordance with this section shall thereafter receive such compensation as the legislature may provide.

(4) The chief judge of the court of appeals may convene the court on the judiciary upon his own motion, and shall convene the court upon written request by the governor or by the presiding justice of any appellate division or by a majority of the judicial council or a majority of the executive committee of the New York state bar associa-

tion thereunto duly authorized. The chief judge of the court of appeals shall act as the presiding officer of the court but in the absence, inability or disqualification of the chief judge, the senior associate judge of the court of appeals sitting on the court shall act as the presiding officer. After the court on the judiciary has been convened and charges of removal have been preferred against a judicial officer, the presiding officer of the court shall give written notice to the governor, the president of the senate and the speaker of the assembly of the name of the judicial officer against whom such charges have been preferred, of the nature of the charges and the date set for the trial thereof, which date shall be not less than sixty days after the giving of such notice. Immediately upon receipt of such notice the legislature shall be deemed to be in session for the purpose of this proceeding.

(5) In the event that any member of the legislature shall, within thirty days after receipt of said notice, prefer the same charges against the judicial officer and such charges are entertained by a majority vote of the assembly the court on the judiciary shall be stayed pending the determination of the legislature, which shall be exclusive and final. But a proceeding by the court on the judiciary for the retirement of a judicial officer for mental or physical disability preventing the proper performance of his judicial duties shall not be stayed.

(6) The court shall have power (a) to designate in each case involving a judicial officer an attorney or attorneys at law to act as counsel to conduct the proceeding; (b) to summon witnesses to appear and testify under oath and to compel the production of books, papers, documents and records before such counsel in advance of the trial and before the court upon the trial; (c) to make its own rules and regulations concerning the procedure to be adopted for the investigation and trial of a judicial officer; (d) to grant immunity from prosecution or punishment when the

court deems it necessary and proper in order to compel the giving of testimony under oath and the production of books, papers, documents and records, and (c) shall have such further powers as the legislature may from time to time confer upon it.

(7) The judges and justices while exercising the powers of a court on the judiciary shall serve without additional compensation, but the legislature shall provide moneys by appropriation to meet the expenses of the court. (Added by vote of the people November 4, 1947.)

APPENDIX "C"

The Background of the Charges

CHARGE 1

Appellant and his brother were law partners from 1933 until October 1955, when Appellant was appointed to the Bench and the firm thereupon dissolved. Having always had charge of supervising the partnership's financial records, he and his brother agreed that, for Appellant's convenience in supervising and carrying out the financial part of the partnership dissolution, the records should be moved to Appellant's chambers.

The charge respecting those records is that Appellant obstructed a judicial inquiry of attorneys in Brooklyn by keeping the records in chambers and refusing to surrender them when requested to do so. It was conceded from the very beginning, long before a subpoena for their production was served, that Appellant had evidenced his willingness to have the records inspected privately, and had several times offered them to the Judicial Inquiry for that purpose. "Obstruction" was charged, however, because he refused to surrender his records, and claimed that there was no necessity for such surrender in order that

they be examined (R., Vol. III, 1053(a)-1056(a)).* Appellant's position was that in view of his judicial position and the curiosity which that would engender among court attaches and newspaper reporters, his records should be examined privately. In addition, he felt that the records should be kept available for his own examination when necessary.

The offers by Appellant were rejected by the chief investigator for the Judicial Inquiry, who insisted that the books be delivered to him. Justice Arkwright, in charge of the investigation at the time, later ruled that the records had to be surrendered.

Presiding Justice Gerald Nolan submitted a statement to the Court on the Judiciary (received by consent in lieu of his testimony, Ex. 3, attached to R., Vol. IV) reading as follows:

> "I have been asked by Justice Louis L. Friedman if I could recall a conversation that I had with him in 1957 relative to the judicial inquiry then being conducted by Mr. Justice Arkwright, pursuant to an order of the Appellate Division, Second Department. I have a distinct recollection of the substance of the conversation, although I am unable to remember all the details or the precise time when the conversation took place. My best recollection is that it was in the fall of 1957 and that at that time Judge Friedman had not been served with a subpoena to appear before the Additional Special Term or to produce any of the records in his possession. At his request I saw him in my chambers at the Appellate Division Courthouse in Brooklyn. He stated that he had heard rumors,

* The letter "R" refers to the record in the Court on the Judiciary, the original of which is on file in the Clerk's office in Albany, New York. Had the Court of Claims not dismissed Appellant's claim on motion, that record would have become part of the record in this case.

which he believed to have emanated from the inquiry, that his personal conduct was under investigation, which caused him considerable concern because he knew that it was the policy of our court that names of persons under investigation should not be disclosed. He also stated that he had been requested to appear and produce books and records at the Additional Special Term presided over by Judge Arkwright, that he had offered to make the books and records available for inspection at his chambers, but that the offer had been rejected.

It was, he said, a matter of common knowledge at the courthouse whenever anyone of any prominence was called as a witness before the judicial inquiry, and that it would be a matter of considerable embarrassment to him if he should be required to appear before the inquiry, and produce his books and records in open court. He was willing, he said, to make the books and records available for inspection at his chambers, and believed that he should be spared, if possible, the embarrassment of an appearance before the Additional Special Term. He inquired whether our court would take some action so as to provide that his books and records might be produced at some place other than at the Additional Special Term. I stated to him that I would submit his inquiry to the members of our court. I did so, a few days later, and it was decided that the court should not intervene, or instruct Judge Arkwright as to the manner in which he should proceed. I so informed Judge Friedman."

Denis M. Hurley, counsel to the Judicial Inquiry, conceded that the records were offered to him for inspection in respondent's chambers (R., Vol. III, 934(a), 951(a), 958(a)). Jackson A. Dykman, former president of the New York State Bar Association heard of the controversy,

volunteered his services, and generously offered the use of his own nearby law office for the examination (R., Vol. II, 514(a), 594(a), 595(a), 641(a), 642(a); Vol. IV, 1373(a)-1375(a)), an offer which Mr. Hurley recommended be accepted (R., Vol. III, 1189(a), bottom of page), but which Justice Arkwright rejected (R., Vol. II, 512(a)).

The only reason given originally for the insistence upon surrender was that any other procedure did not suit the convenience of the chief investigator for the inquiry (R., Vol. II, 595a; Vol. III, 956a, 958a, 959a), even though the suggested places were either across the street or around the corner from the inquiry office (R., Vol. IV, 1265a).

Both Colonel Dykman and Theodore Kiendl, who were called into consultation, advised Appellant that his position was legally justified, and that examination of the records should take place without their surrender (R., Vol. II, 640a, 685a, 686a, 765a, 766a). Appellant sought only to avoid publicity and loss of complete control (R., Vol. II, 548a-551a, 672a-679a, 686a-689a).

Justice Baker, who thereafter took charge of the Inquiry, later said that immediately after he took charge of the inquiry, Appellant offered the books to him for inspection (R., Vol. II, 569(a)) and that if he had been presiding at the time when the books were originally offered by Colonel Dykman, he would have accepted the offer (R., Vol. II, 569(a)). This was consistent with his ruling in other cases when the same question arose, as shown by the following excerpt from minutes taken in an unrelated case. Justice Baker authorized the release of those minutes to Appellant to show what his practice was in all cases (R., Vol. IV, Ex. 2, p. 2, attached to inside back cover).

> "The Court: Perhaps I should say preliminarily that in other situations where attorneys have hesitated or refused to produce and leave with us the records subpoenaed we have gone along with the

> suggestion that those records be examined * * * in the offices of the attorneys under inquiry. * * * If it is a question of surrendering and leaving the records * * * we are perfectly willing to have our accountants * * * go to your office or any other place which may be convenient, to examine those records. * * *"

After Justice Baker took charge of the Inquiry, Appellant made immediate arrangements for the examination of the financial records in Justice Baker's chambers. Justice Baker agreed at a later time that Appellant was justified in protecting his privacy, and "had every reason to complain because it appeared that somebody in the inquiry evidently had violated a confidence, had spoken to [newspaper] reporters" (R., Vol. II, 548(a)).

After the financial records were left with Justice Baker, they were examined by the Inquiry's accountants for over a year (R., Vol. IV, 1371(a)) under security arrangements imposed by him (R., Vol. II, 556(a), 780(a), 781(a)). During that time, the records were always available to Appellant for his own use when it was necessary that he refer to them. After they were fully examined, the records were returned to Appellant.

It was the original refusal to surrender the records to Justice Arkwright's chief investigator which formed the basis for the first charge against Appellant.

CHARGE 2

The second charge involved the same partnership records. It alleged that Appellant withheld those records and partnership money from his brother, refusing to surrender them or account for them. The charge arose from the fact that when the brother was called to testify, and a request was made that he surrender the financial records, he said he could not do so because they were in Appel-

lant's possession, and he could not get them for the purpose of surrender. There has never been any financial or other acrimony between the two brothers, and the liquidation of the partnership and division of its assets was accomplished many years ago in a manner satisfactory to both of them.

CHARGE 3

The third charge alleged that Appellant had violated the Canons of Judicial Ethics, without specifying which ones, and caused his brother to violate the Canons of Professional Ethics. This charge seemingly referred *only* to the two preceding ones. It was not specific, and gave no notice that additional matters were going to be considered as grounds for removal.

CHARGE 4

The fourth matter (Shevack) was never formally charged, but was considered (and accepted) as a ground for removal four months after the Statement of Charges was originally served. The incident happened in 1955, seven years before the charges were made, and only six weeks after Appellant was first appointed to the Bench. Shevack was a six-year old boy who lived two doors away from Appellant. He was injured one day when struck by an uninsured automobile. Several weeks later, his mother and grandfather called at Appellant's home and asked for his help, saying that the child's estranged father had suddenly appeared, and announced that he was going to make a claim because of the injuries suffered by his son (R., Vol. I, pp. 217a-219a). At the time, the father was accompanied by a lawyer whom he had already retained, and the lawyer had informed the grandfather that because of the uninsured status of the automobile which struck the infant, the claim was going to be made under the grandfather's own insurance policy (R., Vol. I, p. 219a).

Appellant was also told that Mr. Shevack, the infant's father, was living apart from his wife and family, had deserted them without providing for their support, and was over $5,000 in arrears in alimony and support payments ordered by the Supreme Court, Kings County (R., Vol. IV, pp. 1349a, 1365a). They said that the enforcement of support payments was difficult because Mr. Shevack was living in Texas with another woman. They were fearful that if the father succeeded in collecting any money for the injuries sustained by his son, he would go to Texas with that money and her son would never see any part of it (R., Vol. I, p. 219a). They requested Appellant's help (R., Vol. I, pp. 218a-219a).

Appellant agreed to notify the insurance company of the information which he had received. He telephoned the president of the company, who was known to him on a personal basis, gave him the information, suggested that the matter be investigated, and if the facts were found to be as the mother claimed, that the negotiations for settlement, if any, should be with the mother of the child rather than with the father or his attorney (R., Vol. I, pp. 99a-100a; Vol. IV, pp. 1333a-1335a). Further conversation then revealed to Appellant that the "uninsured automobile" clause was a new one, and under its terms, the company's obligation for payment was to the parent of the injured child, rather than to the child himself. Under such circumstances, it was the company's policy to make its settlement payment without the necessity of a guardian ad litem or compromise order (R., Vol. I, pp. 121a-122a; Vol. IV, pp. 1344a-1345a).

The insurance company investigated the matter, and some months later called Appellant to say that the information given was correct, and that the company was prepared to settle the claim. It asked Appellant for his thoughts on its value, and then after some discussion, suggested an offer of approximately $3,000 to the infant's

mother to cover both the injuries and the medical expenses. Appellant, after speaking with the child's mother and grandfather, called the insurance company to say that the amount was acceptable (R., Vol. I, pp. 46a-47a; Vol. IV, pp. 1342a-1344a). No fee or compensation of any kind was ever asked for or received by Appellant. The entire fund was used to buy $3,000 worth of American Telephone and Telegraph Company bonds for the infant. When the Judicial Inquiry inquired into the matter several years later, those bonds were brought into court and left with them for their examination.

If Appellant had ignored the call for help, the sum due to the infant would have been paid to the father and disappeared with him when he went back to Texas shortly thereafter. Loss to the infant was prevented because of Appellant's intercession in the matter.

In commenting on this charge, prosecuting counsel said (Minutes of December 10, 1962, p. 14 attached to R., Vol. I):

> "* * * [I]t may well have been an act of friendship on the part of Judge Friedman, and certainly there is no evidence of any fee having been obtained for this act."

He also said:

> "I think it's an incident which perhaps taken alone would not be sufficient for removal—* * *."

CHARGE 5

The final matter, also never charged, but upon which evidence was taken, was that Appellant had caused his brother to violate the income tax laws by failing to declare all of his income. The proof showed that $88.88 had been received in repayment of disbursements in two cases, but had been omitted by the accountant from the

brother's tax report. When the charge was publicized, the Internal Revenue Service assigned its special agents to conduct their own independent investigation, and then completely exonerated Appellant and his brother from any finding of fraud, either civil or criminal. When apprised of this action by the Internal Revenue Service, the Court on the Judiciary made no finding on this charge.

Eighteen out of Appellant's twenty colleagues in the Supreme Court, Kings County, voluntarily submitted a written statement to the Court on the Judiciary (received in lieu of their personal appearances) expressing their "confidence in the ability, character and integrity" of Appellant, and attesting to the fact that he had "performed his judicial functions with skill, experience and impartiality", and offering to appear personally, if the Court desired their oral testimony to that effect.

APPENDIX "D"

Letter of Chief Judge Desmond To His Associate Judges on the Court of the Judiciary

COURT OF THE JUDICIARY

State of New York

Court of Appeals Building
Albany, New York
March 25, 1963

To My Associate Judges of the Court on the Judiciary:

In the Louis L. Friedman matter, I send you herewith a copy of a proposed order to show cause (and supporting papers) tendered to me by attorney Theodore Kiendl but not signed by me. In effect it is a motion to set aside our determination. For reasons briefly stated herein I consider the alleged grounds insubstantial.

The first alleged ground is that the Court on the Judiciary acted without jurisdiction since four members only were present at the organization meeting on August 15, 1962. The answer to that is that the Constitution authorizes the court to adopt its own rules and procedures. Our rules duly adopted provide for a quorum of four. The references in the Constitution (art. VI, § 22b) to substitutes for the Chief Judge or Senior Associate Judge of the Court of Appeals mean only that if one of those judges is unable to be a member of the court, the Court of Appeals appoints a substitute but this has nothing to do with temporary absence or quorums.

Movant argues that after September 1, 1962 when the new constitutional amendment went into effect we failed to give notice of the charges to the Temporary President of the Senate. This is based on a theory that after September 1 we "amended" our charges. However, no amendment was ever made at any time. During discussions about stipulating the record Mr. Kiendl learned from our attorneys that by our charges we meant to include the income tax matter and the negligence case matter. Mr. Kiendl then moved to eliminate from the stipulated record all references to those two matters. We denied the motion. Actually, our minutes show that we sent notifications of the charges to both the Senate President (Lieutenant Governor Wilson) and the Temporary President (Senator Mahoney).

In my opinion it is unnecessary to call a session of the court to hear oral argument on this motion or make a decision thereon. I think, if you concur, that we should notify counsel that the motion is denied. Please let me have your views by mail at your convenience.

s/ C. S. Desmond
Chief Judge

53-A)

IN THE

Supreme Court of the United States

October Term. 1969

No. 1137

LOUIS L. FRIEDMAN,

Appellant,

v.

THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Appellee

RUTH KESSLER TOCH
Solicitor General

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Assistant Attorney General

of Counsel

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NEW YORK STATE CONSTITUTION.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1137

LOUIS L. FRIEDMAN,

Appellant,

v.

THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION

Motion to Dismiss

Louis J. Lefkowitz, Attorney General of the State of New York (Ruth Kessler Toch, Solicitor General and Jeremiah Jochnowitz, of counsel), moves this Court under Rule 16(1)(b) of the Rules thereof to dismiss the appeal in the above-entitled case on the ground that it does not present a substantial federal question and on the further ground that the dismissal of the prior appeal by appellant in *Louis L. Friedman v. Court on the Judiciary* (375 U. S. 10 [1963]) is *res judicata* or whether there is "a substantial federal question" in the above-entitled case.

BRIEF

Nature of Proceedings

This appeal is from the final judgment of the New York Court of Appeals dismissing appellant's claim for salary as an elected Justice of the New York Supreme Court allegedly due him from February 22, 1963, the date of the determination by the New York Court on the Judiciary removing appellant from his office, to February 17, 1965, the date of filing of the claim, and any future salary which might accrue to appellant on the claim, before entry of the judgment. The New York Court of Claims had previously granted the State's motion to dismiss appellant's claim on the ground that the Court lacked jurisdiction over the subject matter and that the claim failed to state a cause of action. The New York State Appellate Division of the Supreme Court, Third Department (by order dated February 1, 1968, as resettled by order dated March 19, 1968) reversed the judgment of the Court of Claims and remitted the matter to the Court of Claims. The Appellate Division by the same order granted leave to the State to appeal to the New York State Court of Appeals and certified the following questions which were decisive of the correctness of its determination:

> "1. Was the Appellate Division correct in reversing the order and judgment of the Court of Claims for the reason that the judgment of the Court on the Judiciary was not *res judicata* as to the present claim?
>
> 2. Does the Court of Claims have jurisdiction of the subject matter of the claim?
>
> 3. Does the claim state a cause of action?"

The Court of Appeals answered the first two questions in the affirmative and the third question in the negative.

Appellant moved the Court of Appeals to reargue or to amend its remittitur. The Court of Appeals on September 25, 1969, denied the reargument but amended its remittitur to recite:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, *viz.*: whether the rights of claimant under the First, Fifth, Sixth and Fourteenth Amendments were denied. The Court of Appeals held that there was no denial of claimant's constitutional rights (See 24 N. Y. 2d 528)."

Questions Involved

1. Was this Court's dismissal of appellant's prior appeal of his ousting by the New York Court on the Judiciary, *res judicata* as to his claim for salary after he was ousted?

2. Are the provisions of the New York State Constitution providing that a judge may be removed "for cause"* so indefinite as to be violative of appellant's constitutional rights?

3. Were the charges served upon appellant so indefinite and was the notice that he received of those charges so short that appellant's constitutional rights to a fair trial were violated?

4. Is the question of whether the New York Court on the Judiciary being properly constituted under the New York State Constitution a federal question or a state question to be determined by the New York State Court of Appeals?

* New York State Constitution, former Article VI, § 9-a, under which the proceedings to remove appellant was started, is set forth in the appendix to this brief.

Facts

The claim was for that portion of appellant's salary as a Justice of the New York Supreme Court payable by the State, allegedly due appellant from February 22, 1963 to February 17, 1965, totaling $41,769.84. It also demanded judgment for additional amounts of salary which would become due "before the entry of the judgment".

The claim alleged that appellant was elected Justice of the Supreme Court in November of 1956 for a term ending December 31, 1970, and that the obligation of the State to pay the salary was a continuing one up to and including the end of his term; that the State's failure to pay the amounts due appellant by reason of his election as Justice of the Supreme Court was a violation of the New York Judiciary Law, § 142 and New York State Finance Law § 6; and that the failure to pay appellant deprived him of equal protection of the law both under the State and United States Constitutions.

The State moved to dismiss the claim on the ground that the New York Court of Claims lacked jurisdiction of the subject matter and also that the claim failed to state a cause of action. Both the State and the claimant, the appellant here submitted affidavits on the motion.

The affidavit in support of the State's motion revealed the following: Appellant was constitutionally removed from the office of Justice of the Supreme Court by the Court on the Judiciary on February 22, 1963, pursuant to State Constitution, Article VI, § 9a, that after his removal and on February 22, 1963, appellant sought an order to show cause from the Court on the Judiciary to vacate the decision of that Court; that the Court on the Judiciary treated the application for this order as a motion to vacate

its determination and denied the motion; that the petition to the Court on the Judiciary seeking the order to show cause raised the same issues as were presented to the Court of Claims; that appellant appealed to the New York State Appellate Division, Third Department, from the determinations of the Court on the Judiciary, and at the same time, brought a proceeding in that Court collaterally attacking the same determinations; that both the appeal and the collateral attack were dismissed on July 9, 1963 (*Matter of Friedman*, 19 A. D. 2d 120), that appellant also appealed from the determinations of the Court on the Judiciary to the Supreme Court of the United States (July 18, 1963) which appeal was dismissed on October 18, 1963 for want of a substantial federal question (*Matter of Friedman*, 375 U. S. 10);

Appellant in his affidavit in opposition to the State's motion alleged various grounds for contending that the determinations of the Court on the Judiciary were void. Those which he still maintains in this Court are:

(a) That the provision of the State Constitution that, of the six members of the Court, one shall be the Chief Judge of the Court of Appeals and the other the senior Associate Judge of the same Court, and if either, or both of them are absent, the Court of Appeals should select another Judge to take the place of the absentee, was not complied with; that the absence of Judge DYE on August 15, 1962 required that another Judge be substituted in his place, and this was not done.

(b) That appellant was served originally with two charges, and a general charge of unethical conduct; that two additional charges were presented at the trial, and that he was not notified of these charges within the time provided in the Constitution.

(c) That appellant was notified that the two additional charges were to be included approximately a month before the trial.

He also argued in the State Court that the term "removal for cause" was vague and, therefore, unconstitutional and that because the Court on the Judiciary acted as Grand Jury, Prosecutor, Judge and Jury, his removal was unconstitutional. He now asserts, in addition, that the Court on the Judiciary considered evidence outside the record made in that Court, to wit: a letter by Justice BELDOCK*, the Presiding Justice of the New York State Appellate Division, Second Department, the Department in which appellant had been serving as a Justice, requesting the convening of such a Court to consider matter involving the conduct of appellant, described in a report of the Appellate Division, Second Department, entitled *Matter of M. Malcolm Friedman*, 17 A. D. 2d 644 (1963).

The State's motion to dismiss was granted by the New York State Court of Claims, reversed by the Appellate Division, which certified the aforementioned questions, and remitted the matter to the Court of Claims. It was again reversed by the Court of Appeals, which dismissed the claim because it did not state a cause of action. In reaching its decision, the Court noted that the procedural defects alleged by claimant did not reach jurisdictional dimensions and did not deprive him of a fair trial.

Decision of the New York Court of Appeals.
21 N. Y. 2d 523.

Of the three questions certified by the Appellate Division, the Court of Appeals decided Question 3 adversely to appellant, *viz.*: Does the claim state a cause of action? In answering the other two questions in the affirmative, the Court held that the judgment of the New York State Court

* It should be noted that an entry in the minutes of the New York Court on the Judiciary, July 6, 1962, refers to a request for convening the Court received from Presiding Justice BELDOCK.

on the Judiciary was not *res judicata* as to the present claim and that the Court of Claims had jurisdiction over the subject matter of the claim, saying (532-533):

> "Claimant's attack on the removal is threefold. Initially he contends that the removal was a nullity because the failure to follow prescribed constitutional procedures with respect to the organization of the Court on the Judiciary and with respect to giving claimant and specified State officers timely notice of the charges deprived the court of subject-matter jurisdiction. Suffice it to say that we have carefully considered each of the alleged irregularities and find no merit to claimant's contention. The procedural defects, if any, relied upon by claimant do not reach jurisdiction dimensions and in no way deprived him of a fair trial.
>
> "Relying on the sweeping language contained in *Matter of Murchison*, 349 U. S. 133, 75 S. Ct. 623, 99 L. Ed. 942, claimant next contends that he was denied due process of law under the Fourteenth Amendment to the United States Constitution because the Court on the Judiciary acted as complainant, prosecutor and Judge. Additionally, he contends that the removal section of the State Constitution (art. VI, § 22, formerly § 9-a) which authorizes a removal 'for cause', without providing any standards to define the meaning of the term, is vague and indefinite and, therefore, violates the United States Constitution.
>
> "These contentions cannot serve as a basis for claimant's action, and in our opinion are without merit."

It then held that the dismissal of the prior appeal of appellant to this Court was *res judicata* on the federal questions. It distinguished between denial of a writ of certiorari which, it stated, imports no expression of opinion on the merits and dismissal of an appeal from a State Court judgment which, it held, is a decision on the merits as to the presence of any "substantial federal question". In

so deciding, it cited Rule 16(1)(b) of the Rules of this Court and Stern and Gressman, *Supreme Court Practice*, §§ 5-18.

The Court of Appeals not only held that the prior decision of this Court was *res judicata* on the existence of a "substantial federal question", but also held that the term "for cause" was not vague. In doing so, it compared the standard "for cause" to other standards being used, saying (pp. 541-542):

> "The 'for cause' standard contained in section 22 (formerly 9-a) of article VI is no more vague than standards of 'misconduct', 'maladministration', 'malfeasance' and 'malversation' in office or wilful and corrupt conduct in office which are traditionally found in statutes authorizing the removal of public officers (see, *e.g.*, Public Officers Law, Consol. Laws, c. 47, §§ 32, 36). Nor is the standard any more vague than the standard of "good behavior" with respect to Federal Judges contained in section 1 of article III of the United States Constitution.
>
> "In sum we find claimant's contention to be as wanting in substance as the United States Supreme Court did when it dismissed the claimant's appeal from the determination of the Court on the Judiciary 'for want of a substantial federal question'."

The Court also held that appellant's contention that the Court on the Judiciary was prosecutor and judge, was without merit. It distinguished the situation in the instant case from that in *Matter of Murchison*, 349 U. S. 133. Here, as distinguished from *Murchison*, there was no one-man grand jury holding its proceedings in secret chambers, but a trial in open court permitting cross examination of witnesses by appellant. Thus, the *Murchison* case did not fulfill the principle that a fair trial in a fair tribunal is the basic requirement of due process. But in the instant

case, as the Court of Appeals stated, the Court on the Judiciary had no interest in the outcome, nor did it pre-judge the facts. The Court on the Judiciary merely determined as a matter of law that there was a basis for preferral of charges. Final charges were then prepared by a counsel designated by the Court to conduct the proceeding. This, the Court of Appeals said, did not cause the Court on the Judiciary to become so intimately involved with the case so as to deprive appellant of an impartial tribunal.

Having reached this conclusion, it reversed the order of the Appellate Division and reinstated the judgment of the Court of Claims dismissing the claim.

ARGUMENT

The Court of Appeals correctly held that there was no denial of appellant's constitutional rights.

A. The dismissal by this Court of appellant's appeal from the determination of the Court on the Judiciary ousting him from his office is *res judicata* as regard to the present claim for salary during the period of his ousting.

The appellant's claim is for salary allegedly due as a Justice of the Supreme Court of the State of New York. It is predicated upon his contention that his removal by the Court on the Judiciary of the State of New York was void and that he is entitled to salary from the time of this determination to the present date.

Appellant was removed by the Court on the Judiciary by a determination made February 22, 1962. He immediately sought an order to show cause to that Court to vacate its determination. In the petition seeking the order to show cause he raised the same basic issues which were later presented to the Court of Claims of the State of

New York in the present claim. The Court on the Judiciary treated the order to show cause as a motion to vacate its determination and denied the motion *Matter of Friedman*, 12 N. Y. 2d a (Court on the Judiciary) saying (e):

> "*Thereafter*, LOUIS L. FREEDMAN *presented to the court his petition and a proposed order to show cause to vacate the said decision of the court, on the asserted grounds (1) that two of the members of the Court were not present when the court was convened on August 15, 1962 and that therefore the Court on the Judiciary was never properly composed; (2) that proper notice of all the charges within 60 days before the trial was not given to the Governor of the State of New York, the President of the Senate, the Temporary President of the Senate, and the Speaker of the Assembly; and (3) that the proceedings contravened the due process provision of the Fourteenth Amendment to the United States Constitution. On April 3, 1963 the court handed down the following decision:* (Italics by Court)
>
> "The court having treated the proposed order to show cause as a notice of motion to vacate the court's determination and having duly considered the matter, denies said motion. The Court on the Judiciary was duly convened pursuant to the Constitution and at all its sessions there were present members sufficient to constitute a quorum under the court's rules adopted pursuant to the provisions of the Constitution."

Appellant appealed to this Court from the determinations of the Court on the Judiciary to this Court. This Court granted a motion by the Court on the Judiciary, the appellee, to dismiss the appeal (375 U. S. 10 [1963]), saying:

> "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question."

The New York Court of Appeals in its opinion considered whether the decision of this Court was *res judicata*

on the "federal question" (24 N. Y. 2d 528 [1969]), saying (pp. 538-539):

> "This, [that dismissal of an appeal imports no expression of opinion upon the merits of the case] is not true, however, where the Supreme Court dismisses an appeal from a State court 'for want of a substantial federal question'. As Messrs. Stern and Gressman state in their treatise on Supreme Court Practice (§ 5-18, pp. 195-196):
>
> '*When the Court feels that the decision below is correct and that no substantial question on the merits has been raised, it will affirm an appeal from a federal court, but will dismiss an appeal from a state court "for want of a substantial federal question."*' Only history would seem to justify this distinction; it would appear more sensible to affirm appeals from both state and federal courts when the reason for the summary disposition is that the decision below is correct. But if the bar fully understands that "dismissed for want of a substantial federal question" in a state court appeal is the equivalent of affirmance on the merits insofar as the federal questions under 28 U. S. C., § 1257 (1) and (2) are concerned, and is not limited to a determination of whether there is such a federal question, the difference in nomenclature does no harm.

This holding accords with Rule 16(1)(b) of this Court which reads as follows:

> "(b) The court will receive a motion *to dismiss an appeal from a state court on the ground that it does not present a substantial* federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis." (Emphasis supplied.)

* Emphasis by the Court.

The dismissal by his Court on the appeal in *Friedman v. Court on the Judiciary*, was based upon there being no substantial federal question (and not for any of the other reasons for dismissal of an appeal set forth in Rule 16[1][b]).

If there were a substantial federal question here it would not have been the right to salary of a State officer but the propriety of his removal from office. This Court has already ruled on the propriety of his removel when it found there was no substantial federal question in the first appeal.

The situation here is almost identical with *Markham Advertising Co. Inc. v. Zahn*, 415 F. 2d 772 (U. S. Ct. of App. 9th Cir. [1969]), cert. den. ____ U. S. ____ (Dec. 19, 1969). *Markham* had originally brought an action in the State courts seeking a judgment declaring that it would be unlawful for respondents to require petitioners to remove outdoor advertising signs without compensation and, also, that it would be unlawful to require removal of such signs before the federal share of just compensation (75%) should be allocated for the purpose.

The State courts had dismissed the petition and an appeal was taken by petitioners to this Court, which dismissed it "for want of a substantial federal question" (393 U. S. 316). Thereafter, *Markham* brought an action in the United States District Court, Western District of Washington, Southern Division, seeking a declaratory judgment against being required to remove the outdoor signs without compensation. That Court summarily dismissed the complaint. Appeal was taken from the dismissal to the United States Court of Appeals for the Ninth Circuit, which Court Stated (415 F. 2d 772 [decided July 30, 1969]):

> "The District Court ruled that the issue of mandatory compensation was foreclosed by *res judicata*, having already been adjudicated by the Washington State courts, *Markham v. State Highway Commission*, 73 W. D. 2d 413, 439 P. 2d 248 (1968), and the decision of the Supreme Court of the United States dismissing the appeal from the decision of the Supreme Court of Washington, *supra*, for want of a substantial federal question. 393 U. S. 316 (1969).
>
> "We agree."

The petitioners sought review by this Court, through a writ of certiorari, of the affirmance of the dismissal of their complaint by the Ninth Circuit. The issue of whether this Court's dismissal of the appeal from the judgment of the State Court was *res judicata* in the second action brought in the United States District Court was briefed by both petitioners and respondents in the certiorari proceedings. This Court denied certiorari on December 19, 1969 (___ U. S. ___).

It should also be noted that the doctrine of *res judicata* is applicable not only to questions raised in the former proceeding but to any question which might have been raised. See *Chicot County Drainage District v. Baxter State Bank, et al.*, 308 U. S. 371 (1940) where this Court said (p. 378):

> "Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' *Grubb v. Public Utilities Comm'n, supra; Cromwell v. County of Sac, supra.*"

Every question now raised in the instant appeal either was or could have been raised in appellant's first appeal to this Court. It is submitted that, accordingly, the dismissal

of the _____ appeal from the determinations of the Court on the Judiciary is *res judicata* as to any action brought by petitioner for salary as a Supreme Court Judge where such action is based on the premise that petitioner never was validly dismissed from his judicial post by the Court on the Judiciary.

B. The Court of Appeals correctly held that the removal of a judge "for cause" and the procedures used by the Court on the Judiciary were not violative of appellant's constitutional rights.

The Court of Appeals after holding that there had been a final determination on the merits by this Court barring the raising again the federal issues, nevertheless considered them and correctly decided that there was no violation of appellant's constitutional rights in this matter.

On the question of violation of appellant's constitutional rights, the Court of Appeals said (24 N. Y. 2d 528, 540):

> "It must be remembered that the power of removal is designed to insure efficiency and fidelity in the discharge of official duty. The office of a Judge is so delicate that it is difficult, if not impossible, to enumerate and define, with legal precision, the conduct for which a Judge ought to be removed (*cf. Ex parte Secombe*, 19 How. [60 U. S.] 9, 14, 15 L. Ed. 565 [dealing with disbarment of an attorney]).
>
> Thus it is widely recognized that 'the degree of incompetency or misconduct which amounts to sufficient cause for removal must of necessity, within certain established limits, rest somewhat in the sound discretion in the officer [or body] in whom the power of removal is vested' (*Matter of Saushier v. Wheeler*, 252 App. Div. 267, 270, 299 N. Y. S. 466, 472; *Farish v. Young*, 18 Ariz. 298, 158 P. 845; 4 McQuillin, Municipal Corporations, § 12.234, and cases cited therein). Although the body which exercises the power of removal is vested with broad discretion where the term 'cause'

> is not defined, it is manifest that the power cannot be exercised arbitrarily. The phrase 'for cause' clearly means 'legal cause'—some cause affecting or concerning the ability or fitness of the incumbent to perform the duty imposed upon him (*People ex rel. Mandaq v. Board of Fire Comrs.*, 72 N. Y. 445, 449)."

In *Sarisohn v. Appellate Div., Second Dept., Supreme Court of the State of New York* (265 F. Supp. 455), the Federal District Court also had to determine whether the words "for cause" were vague and also upheld the constitutionality of a removal of a Judge by the Appellate Division "for cause", saying (p. 458):

> "The words 'for cause' mean for a cause to be enumerated and specified in each particular instance so that the defendant may be duly notified and adequately prepared to defend the charges. It does not mean that a judge may be removed for 'cause' without more and without an enumeration of the charges constituting the alleged 'cause'. It would be impossible to enumerate in any statute all the possible grounds and circumstances justifying the removal of a judicial officer. Guidelines may be found in the Canons of Ethics, applicable to both attorneys and judges, adopted by the American Bar Association and other bar associations, and also in the general moral and ethical standards expected of judicial officers by the community. 'For cause' has been defined in several cases involving the removal of judicial officers and they provide a reasonable person with a competent definition of this phrase."

Appellant contends that his constitutional rights were violated because the Court on the Judiciary combined the functions of complainant, prosecutor and judge. That Court having received a complaint from the Presiding Justice of the New York State Appellate Division, Second Department, considered the charge and then appointed attorneys to prosecute. This is no different than a Court which orders an accused held for trial, appointing counsel

to defend him. All the essentials of fair play were afforded appellant here. He was represented by an attorney who had the right to cross examine the accusing witnesses and who vigorously defended him. The Court of Appeals distinguished the situation in the instant case from that in *Matter of Murchison, supra*, 349 U. S. 133 (1955), saying (24 N. Y. 2d 518, 543-544):

> "The proceedings in the Court on the Judiciary are a far cry from the *Murchison* case, where the Trial Judge not only pressed the charges, acted as a witness and could fairly be likened to a party, but the right of cross-examination—a fundamental right, the deprivation of which is error of the first magnitude (*Smith v. Illinois*, 390 U. S. 129, 131, 88 S. Ct. 748, 19 L. Ed. 2d 956)—was virtually nonexistent.
>
> "There is simply no basis for holding that the procedure followed by the Court on the Judiciary deprived claimant on a fair trial in a fair and impartial tribunal. Here the Court on the Judiciary was not the accuser, for it was the report of the Supreme Court Justice which served as the complaint. Nor can it be said that the Court on the Judiciary had an interest in the outcome of the case because it reviewed the allegations in the complaint in order to ascertain, as any court would on a demurrer or motion, whether basis existed for preferral of charges. In other words, far from prejudging the facts, the Court on the Judiciary merely determined, as a matter of law, that the report contained facts sufficient to constitute ground for the preferral of charges. The final charges were preferred by counsel designated by the court, but it cannot be assumed that, because the court designated the attorneys to conduct the proceeding, the court became so intimately involved with the case as to deprive claimant of an impartial tribunal. If this were the law, the People would have cause to object in every criminal case in which a Trial Judge assigns counsel for an indigent defendant and presides at the trial."

In *Matter of Osterman v. Court on the Judiciary*, 13 N. Y. 2d (a), cert. den. 376 U. S. 914 (1964), a judge was removed under the same sections of the New York State Constitution by a subsequently called Court on the Judiciary. The very same issues generally presented here were, before the Court in *Osterman*, yet *certiorari* was denied.

Appellant also contends that the Court on the Judiciary considered evidence outside the record. He bases this contention on the following statement in the opinion of the Court of Appeals (24 N. Y. 2d 518, 530):

> "In 1956 claimant, Louis Friedman, was elected to the office of Supreme Court Justice for a term expiring on December 31, 1970. On July 2, 1962 the Presiding Justice of the Appellate Division, Second Department, pursuant to the State Constitution (art. VI, § 9-a [now § 22]), requested the then Chief Judge of the Court of Appeals to convene the Court on the Judiciary to consider matters involving the conduct of the claimant disclosed in a report of a Justice of the Supreme Court filed in the Appellate Division, Second Department, in a disciplinary proceeding entitled *Matter of M. Malcolm Friedman* (see 17 A. D. 2d 644) brought against claimant's brother."

There is nothing in the record of the proceedings in the Court on the Judiciary nor in the records of any of the many courts in which appellant has heretofore sought relief, either by appeal from or by indirect attack on the determination of the Court on the Judiciary, that this letter and the report were considered by the Court on the Judiciary in reaching its determination. The letter* and report were the complaint which resulted in the Court on the Judiciary being convened. The Court on the Judiciary after a preliminary examination determined that suf-

* The minutes of the Court on the Judiciary for July 6, 1962 show that the Court was convened after request from Justice Bel-dock.

ficient cause existed for preferring charges and charges were served upon appellant. Appellant had an opportunity to answer the charges and answered them. Thereafter, evidence was presented by the prosecuting and defense attorneys. The appellant duly represented by counsel contested these charges. He was given a full opportunity to cross-examine all witnesses and present testimony in his own behalf. After hearing all the testimony the Court made its determination. Nowhere has it been shown that the complaint of the Presiding Justice of the Appellate Division and report were considered by the Court on the Judiciary except in the first instance to determine whether charges should be made. The judgment of the Court was solely on the evidence presented at the trial. The original investigation of the complaint in order to determine whether charges should be brought was not a violation of appellant's constitutional rights.

C. The notices given appellant of the charges were both adequate and specific and appellant cannot attack either at this point having proceeded to trial and awaited adverse judgment of the Court before contesting them.

Appellant contends that his constitutional rights were violated in that he was not given adequate or specific notice of all the charges brought against him.

He was timely served with the following three charges alleging unethical conduct:

> "That Louis L. Friedman has abused his public office as a Justice of the Supreme Court of the State of New York, Second Judicial District (1) by interfering with and obstructing a Judicial Inquiry and Investigation ordered by the Appellate Division of the Supreme Court of the State of New York Second Judicial Department, on the 21st day of January 1957; (2) by engaging in unethical and improper conduct in

that, while a Justice of the Supreme Court, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly preserving or accounting therefor and, moreover, would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor; (3) by violating and failing to observe the concept, spirit and letter of the canons of judicial ethics, and by causing M. Malcolm Friedman to violate and to fail to observe the canons of professional ethics."

Within 60 days petitioner was served with the following two additional charges:*

"(1) that claimant had allegedly practiced law in violation of the Constitution of the State of New York, and (2) that claimant had supposedly violated the Income Tax Laws of the State and Federal Governments."

These additional charges were encompassed in the original Charge 3. The second additional charge may be disregarded because the Court made no finding that appellant had violated the tax laws of the State and Federal Government.

The decision of the Court on the Judiciary on the charges was as follows (12 N. Y. 2d [d] [e]):

"(1) That Louis L. Friedman interfered with and obstructed a Judicial Inquiry and Investigation ordered on the 21st day of January, 1957 by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department;

---

* Petitioner stated that he was served with these additional charges on December 10, 1962—32 days before the trial (Pet'r Br. in N. Y. State App. Div., p. 16). He, however, knew of these charges on October 19, 1962 for he states the prosecution sought to incorporate them in a stipulated record (Pet'r Jurisdictional Statement, pp. 9, 10).

"(2) That said LOUIS L. FRIEDMAN engaged in unethical and improper conduct in that, while a Justice of the Supreme Court, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly preserving or accounting therefor and, moreover, would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor;

"(3) That said LOUIS L. FRIEDMAN by his actions as to the Shevack claim violated and failed to observe the concept, spirit and letter of the canons of judicial ethics;

"(4) That by the acts and omissions described in findings Nos. 1, 2 and 3 hereinabove, said LOUIS L. FRIEDMAN abused his public office as a Justice of the Supreme Court of the State of New York;

"(5) That said abuse of public office and said acts and omissions are sufficient cause for the removal from office of said LOUIS L. FRIEDMAN;"

Finding 1 falls within Charge 1 of the original charges.

Finding 2 falls within Charge 2 of the original charges.

Finding 3 falls within Charge 3 of the original charges.

Findings 4 and 5 are conclusions based upon Findings 1, 2 and 3.

Since what appellant was found guilty of was covered in the original charges, his objection to not being given timely service of the other charges is immaterial.

Petitioner knew before he went to trial that he was served with the additional charges. He could have objected to going to trial and demanded additional time to prepare. He did not. He went to trial on the charge and it was only after an adverse decision was rendered that he sought to

raise the question. In doing so, he waived whatever irregularity there may have been in the service of the additional charges.

An analogous situation delaying raising a question was considered in *People* v. *White*, 2 N. Y. 2d 220 (1957), app. dis. and cert. den. 353 U. S. 969 (1957) where the Court of Appeals said (p. 225):

> "[The defendant] did not once appropriately raise the question of whether defendant's right to a speedy trial had been violated until his appeal in the Appellate Division."

And in holding against the defendant explained (p. 224):

> "The rational of this rule is that a defendant cannot participate in a trial and save his objection in this respect to challenge an adverse verdict."

In *Humes* v. *United States*, 186 F. 2d 875 (U. S. Court of Appeals, 10th Cir. [1951]), the Court said (p. 878):

> "Having failed to request the court for time to secure and leave to introduce further evidence, after Gercina testified in rebuttal, he may not now claim prejudice by surprise."

and in *Crocklin* v. *United States*, 252 F. 2d 561 (U. S. Court of Appeals, 5th Cir., the Court said (p. 562):

> "The general rule is well illustrated here: that an accused may not by failing to ask for a mistrial, gamble on winning before the jury, and then, for the first time, on appeal ask for a reversal when he loses his gamble."

In *Campbell* v. *United States*, 355 F. 2d 394 (U. S. Court of Appeals, 7th Cir. [1966], cert. den. 385 U. S. 922), the Court refused to reach the merits because of failure of the petitioner to make timely objection, saying (395):

> "[1, 2] We do not reach the merits of the petitioner's claim because we are convinced that it is not

available as a ground for a collateral attack upon his sentence. We have examined the trial record. At no time did the petitioner's counsel object to the comments or move for a mistrial. Ordinarily, such failure constitutes a waiver of the right to assert error on appeal. *United States* v. *Wright*, 309 F. 2d 735, 738 7th Cir. 1962), cert. denied, 372 U. S. 929, 83 S. Ct. 873, 9 L. Ed. 2d 733 (1963); *Langford* v. *United States*, 178 F. 2d 48, 55 (9th Cir. 1949), cert. denied, 339 U.S. 938, 70 S. Ct. 669, 94 L. Ed. 1355 (1950). If such a failure to object or move for a mistrial precludes a reversal upon direct appeal, *a fortiori* such failure must similarly preclude relief under section 2255. *Kapsalis* v. *United States*, 345 F. 2d 392, 394 (7th Cir. 1965)."

Similarly here, appellant, not having raised the question of timeliness of the service of the additional charges but having gone ahead with the trial on the merits, cannot raise the question after the charges were decided adversely to him.

D. The question of whether the Court on the Judiciary was properly constituted is not a federal question, and the determination of the Court of Appeals that it was, is not subject to federal court review.

Appellant also contends that the Court on the Judiciary was not organized as prescribed by the New York State Constitution. He contends that the failure of two judges to attend the first meeting (Judge Dye of the Court of Appeals and Judge Rabin of the Appellate Division, First Department) prevented the Court from legally coming into existence. Appellant is wrong.

The Court had already been convened and was in legal existence before that session. Former Article VI, § 9-a(4), of the New York Constitution provided for the convening of a Court on the Judiciary as follows:

> "The chief judge of the court of appeals may convene the court on the judiciary upon his own motion, and shall convene the court upon written request by the governor or by the presiding justice of any appellate division or by a majority of the judicial council or a majority of the executive committee of the New York state bar association thereunto duly authorized."

The minutes of the Court on the Judiciary (Exhs. A-B attached to appellant's affidavit of February 17, 1965) show that on July 2, 1962 Hon. George J. Beldock, Presiding Justice of the Appellate Division, Second Department, requested Chief Judge Charles S. Desmond to convene the Court on the Judiciary to consider matters involving the conduct of petitioner. The minutes further show the following notations for July 6th:

> "Notification by Chief Judge Desmond to the Presiding Justice of each of the four Departments of the Appellate Division to designate a Justice pursuant to Section 9-a of Article VI of the Constitution and notification of the convening of the Court on the Judiciary to consider matters concerning the conduct of Justice Louis L. Friedman as outlined in the request for convening the court received from Presiding Justice Beldock.
>
> "Notification to Judge Marvin R. Dye, Senior Associate Judge of the Court of Appeals."

These minutes also show the designation of one justice from each of the State's Appellate Divisions to serve on the Court, the last on July 18th being the designation of Justice Benjamin J. Rabin to serve as a member from the First Department.

Thus, according to the minutes of the Court on July 6, 1962, the Court was constitutionally convened by Chief Judge Desmond. Its composition was determined by July 18th, and by that time, it certainly was a legal entity.

Appellant argued that under Article VI, § 9-a the absence or inability or disqualification of a Judge of the Court on the Judiciary means his inability to attend one session. This is a strained and erroneous construction. (Chief Judge DESMOND, in his letter to the other Judges of the Court at the time the proposed order to show cause was submitted to them, maintained that this section was not applicable to a temporary absence [63].) The absence of a Justice of the Supreme Court from one of its sessions would not dissolve the Court and void its actions. In the instant case, the whole Court attended the entire trial except for the session of August 15, 1962. The whole Court received the evidence in this case and rendered the decision. The failure of two judges to attend one session did not make every ruling of the Court invalid. The action of the entire Court in proceeding with the case ratified whatever was done on August 15, 1962.

In any event, the question of whether the procedure followed by the Court on the Judiciary was proper under the New York State Constitution was a matter for the New York Court of Appeals to decide and they have held it proper, saying (24 N. Y. 2d 518, 537):

> "Claimant's attack on the removal is threefold. Initially he contends that the removal was a nullity because the failure to follow prescribed constitutional procedures with respect to the organization of the Court on the Judiciary and with respect to giving claimant and specified State officers timely notice of the charges deprived the court of subject-matter jurisdiction. Suffice it to say that we have carefully considered each of the alleged irregularities and find no merit to claimant's contention. The procedural defects, if any, relied upon by claimant do not reach jurisdictional dimensions and in no way deprived him of a fair trial."

The determination of the New York Court of Appeals on these questions since they are entirely State matters, should be sustained.

It follows, therefore, that the absence of two judges from the first session did not violate appellant's constitutional rights.

CONCLUSION

No substantial federal question is presented by this appeal and the Court should grant appellee's motion to dismiss.

Dated: February 24, 1970.

Respectfully submitted,

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APPENDIX

Constitution. Former Art. 6 § 9-a

"§ 9-a. [REMOVAL OR RETIREMENT OF JUDGES AND JUSTICES BY COURT ON THE JUDICIARY.]

(1) A judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a surrogate, a special surrogate, a judge of the court of general sessions of the county of New York; a county judge, a special county judge or a justice of a city court of record, may be removed or retired also by a court on the judiciary. The court shall be composed of the chief judge of the court of appeals, the senior associate judge of the court of appeals and one justice of the appellate division in each department designated by concurrence of a majority of the justices of such appellate division. In the absence, inability or disqualification of the chief judge of the court of appeals or of the senior associate judge of that court, the court of appeals shall designate a judge or judges from the court of appeals to act in his or their stead.

(2) No judicial officer shall be removed by virtue of this section except for cause or be retired except for mental or physical disability preventing the proper performance of his judicial duties, nor unless he shall have been served with a statement of the charges alleged for his removal or the grounds for his retirement, and shall have had an opportunity to be heard.

(3) The trial of charges for the removal of a judicial officer or of the grounds for his retirement shall be had before a court on the judiciary. The affirmative concurrence of not less than four members of the court shall be necessary for the removal or retirement of a judicial officer.

The court in its discretion may suspend a judicial officer from the exercise of his office pending the determination of the proceedings before the court. The action of the court shall not extend further than to remove from office, or removal from office and disqualification to hold and enjoy any public office of honor, trust or profit under this state, or to retirement for disability; but any judicial officer whose removal is sought shall be liable to indictment and punishment according to law. A judicial officer retired for disability in accordance with this section shall thereafter receive such compensation as the legislature may provide.

(4) The chief judge of the court of appeals may convene the court on the judiciary upon his own motion, and shall convene the court upon written request by the governor or by the presiding justice of any appellate division or by a majority of the judicial council or a majority of the executive committee of the New York state bar association thereunto duly authorized. The chief judge of the court of appeals shall act as the presiding officer of the court but in the absence, inability or disqualification of the chief judge, the senior associate judge of the court of appeals sitting on the court shall act as the presiding officer. After the court on the judiciary has been convened and charges of removal have been preferred against a judicial officer, the presiding officer of the court shall give written notice to the governor, the president of the senate and the speaker of the assembly of the name of the judicial officer against whom such charges have been preferred, of the nature of the charges and the date set for the trial thereof, which date shall not be less than sixty days after the giving of such notice. Immediately upon receipt of such notice the legislature shall be deemed to be in session for the purpose of this proceeding.

(5) In the event that any member of the legislature shall, within thirty days after receipt of said notice, prefer the same charges against the judicial officer and such charges are entertained by a majority of the assembly the court on the judiciary shall be stayed pending the determination of the legislature, which shall be exclusive and final. But a proceeding by the court on the judiciary for the retirement of a judicial officer for mental or physical disability preventing the proper performance of his judicial duties shall not be stayed.

(6) The court shall have power (a) to designate in each case involving a judicial officer an attorney or attorneys at law to act as counsel to conduct the proceeding; (b) to summon witnesses to appear and testify under oath and to compel the production of books, papers, documents and records before such counsel in advance of the trial and before the court upon the trial; (c) to make its own rules and regulations concerning the procedure to be adopted for the investigation and trial of a judicial officer; (d) to grant immunity from prosecution or punishment when the court deems it necessary and proper in order to compel the giving of testimony under oath and the production of books, papers, documents and records, and (e) shall have such further powers as the legislature may from time to time confer upon it.

(7) The judges and justices while exercising the powers of a court on the judiciary shall serve without additional compensation, but the legislature shall provide moneys by appropriation to meet the expenses of the court."

MAR 6 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1137

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Appellant,

v.

THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellee's reliance (pp. 12-13) on the recent case of *Markham Advertising Co., Inc.* v. *Zahn*, 415 F.2d 772 (9th Cir.), *cert. denied*, October Term, 1969, No. 684, is misplaced. That case does not represent a ruling by this Court that a prior dismissal of an appeal for want of a substantial federal question is a determination on the merits of the federal issues involved. Rather, this Court's denial of certiorari, as has been pointed out many times, involved no expression of opinion as to the merits of the case, and therefore no expression as to the correctness of the view expressed by the Circuit Court of Appeals. We submit that the *res judicata* effect, if any, of the dismissal by this Court of an appeal "for want of a substantial federal question" is an important undecided federal issue which deserves plenary examination by the Court, especially in view of the

very serious constitutional issues which we believe are presented on this appeal.

Appellee's contention (pp. 15-16) that the procedure in the Court on the Judiciary did not differ from a routine appointment by a court of counsel for an accused is an incomplete analogy. As Judge Burke noted in the Court of Appeals:

> "I would merely note in passing that the majority's parallel to a Judge assigning counsel to represent an indigent defendant is less than accurate. The parallel would be complete if that Judge, at the time he assigned counsel, also dictated what defenses or contentions counsel was to raise in behalf of the defendant." (A22, footnote, Jurisdictional Statement)

The references by the Chief Judge of the Court on the Judiciary to the appointed attorneys as "our attorneys" and to the charges prepared by them as "our charges" raise a substantial question as to the essential fairness of the Court on the Judiciary and of its organization and procedures. The prejudicial effect of the procedural deficiencies and the vague "for cause" removal provision is aggravated by the absence of a right of appeal within the state system which could review the sufficiency of the evidence submitted and determine if it justified the drastic penalty of removal from elected office. Without such a review, fairness to the judge involved required substantial procedural safeguards which were not provided in this case.

In addition to these matters, appellee's brief contains several factual errors.

At page 19, appellee states that "[w]ithin 60 days petitioner was served with the following two additional charges . . ." referring to the charges of illegal practice of law

and violation of the state and federal tax laws. This is incorrect. Appellant was *never served* with such charges.* Proof of this fact is that, at page 20 of its brief, appellee seeks to justify Finding 3 as falling within Charge 3. This attempted justification is necessary because no charges of practicing law and income tax violation were in fact ever served. Contrary to appellee's claims at page 19 that "these additional charges were encompassed in the original Charge 3" (violation of canons of judicial ethics) it is patent that such a vague charge could not possibly and did not give notice to appellant that it included such specific matters as illegal practice of law and income tax evasion (a charge later dropped by the Court on the Judiciary). If appellee's contention is correct, appellant could have been also tried, under the same general charge of violation of the judicial canons, on any or all of the hundreds of criminal charges in the federal and state penal codes.

Appellee's further claim that appellant was not prejudiced because he could have asked for more time to prepare for trial is frivolous. His objection to the receipt of evidence on charges never made, overruled by the Court on the Judiciary, clearly preserved his rights.

Appellee contends (pp. 17-18) that there is no proof that the Court on the Judiciary ever considered the confidential report of Mr. Justice Meyer which, as later disclosed by the

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* The footnote on page 19 grossly misstates appellant's brief in the Appellate Division. It was *not* stated there that appellant was served with these additional charges on December 10, 1962. That brief stated:

> "It was on December 10, 1962, four months after the proceedings had been instituted, and only 32 days before the trial (instead of the 60 days required under the Constitution), that appellant *was advised for the first time* that evidence as to the two additional charges would be accepted by the Court, although the charges had never been made." Appellant's Brief, pp. 46-47 (emphasis added).

opinion of the Court of Appeals, ". . . served as the complaint against Appellant" (A-16). This is incredible on its face. If the Court on the Judiciary did not consider it, how could it have served as the complaint? If that Court did consider it, this was a fundamental deprivation of appellant's rights of confrontation and cross-examination. Appellee's bland statement at page 18 that "[t]he judgment of the Court was solely on the evidence presented at the trial" is wholly conclusory and cannot be accepted in the light of the disclosure that the Meyer report "served as the complaint" against appellant.

Finally, appellee errs in contending at pages 22-23 that the Court on the Judiciary was "convened" on July 18, 1962, prior to the initial session on August 15, 1962, at which time essential judges were absent. This argument is frivolous. The minutes of the Clerk of the Court on the Judiciary (Ex. 1 to Friedman affidavit of January 30, 1967) show that the "court convened" on August 15, 1962, not July 18. The letter which Chief Judge Desmond sent to the Governor and the other State officers (see exhibit attached to Ex. C to Brenner affidavit) recited in paragraph 2 thereof that

> "On *August 15, 1962*, I, as Chief Judge of the Court of Appeals, *convened* the Court on the Judiciary * * *." (emphasis supplied)

The press release issued by the Court on the Judiciary on August 15, 1962 (see press release attached to Ex. C to Brenner affidavit) read* that "Chief Judge Desmond convened the court on August 15, 1962 and the six judge body determined preliminarily * * *". Another press release issued on De-

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* The statement in this release that "the six judge body" made the determination on August 15, 1962 was erroneous, since only four judges were present that day.

cember 5, 1962 also recited that "Chief Judge Desmond on August 15, 1962, convened the Court on the Judiciary * * * ". There is no escape from the fact that the Court on the Judiciary attempted to convene on August 15, 1962, not on an earlier date as appellee contends. It was not a validly constituted court, and its actions on that date and thereafter were just as much a nullity as a conviction rendered by an improperly constituted court-martial.

CONCLUSION

Substantial and important federal questions are presented which involve not only appellant's judicial office and honor, but the rights of all elected judges to due process and equal protection of the laws. It is respectfully submitted that this Court should hear and decide these issues on the merits.

Dated: New York, N. Y.
March 4, 1970

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

FRIEDMAN *v.* NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 1147. Decided March 23, 1970

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.